THE CESAR CHAVEZ PUBLIC CHARTER SCHOOLS FOR PUBLIC POLICY

SOLICITATION OF PROPOSALS

PERMIT FACILITATOR SERVICES

The Cesar Chavez Public Charter Schools for Public Policy, in accordance with section 2204 (c) (1) (A) of the DC School Reform Act of 1995 (Public Law 104-134), hereby solicits proposals for permit facilitator services for the renovation of an existing facility to house a secondary school.

All necessary forms and a full RFP may be obtained by calling 202-547-3975 ext. 10.

The Cesar Chavez Public Charter Schools will receive bids from March 30, 2007 to COB April 6, 2007. Send Proposals to:

Attn: Christy Gill
709 12th Street, SE
Washington, D.C. 20003

THE CESAR CHAVEZ PUBLIC CHARTER SCHOOLS FOR PUBLIC POLICY

SOLICITATION FOR PROPOSALS

CONTRACTOR TO PROVIDE PRE-CONSTRUCTION SERVICES

The Cesar Chavez Public Charter Schools for Public Policy, in accordance with section 2204 (c) (1) (A) of the DC School Reform Act of 1995 (Public Law 104-134), hereby solicits proposals for a contractor to provide pre-construction services for the renovation of an existing facility to house a secondary school.

All necessary forms and a full RFP may be obtained by calling 202-547-3975 ext. 10.

The Cesar Chavez Public Charter Schools will receive bids from March 30, 2007 to COB April 6, 2007. Send Proposals to:

Attn: Christy Gill
709 12th Street, SE
Washington, D.C. 20003

DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

Certification of Filling Vacancies
In Advisory Neighborhood Commissions

Pursuant to D.C. Official Code §1-309.06(d)(6)(G) and the resolution transmitted to the District of Columbia Board of Elections and Ethics ("Board") from the affected Advisory Neighborhood Commissions, the Board hereby certifies that vacancies have been filled in the following single-member districts by the individuals listed below:

Alan Blevins
Single Member District 3D02

Carol J. Green
Single Member District 6B07

Michelle Starr
Single Member District 7D07

Linda S. Green
Single Member District 7E02

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF JUSTICE GRANTS ADMINISTRATION

REQUESTING APPLICANTS FOR REVIEW PANELS

The Offices of Justice Grants Administration is seeking the services of qualified applicants to assist with the reviewing of applications, as required under DC Municipal Regulation Title I – Mayor and Executive Agencies Chapter 50 "Sub Granting to Private and Public Agencies", submitted by qualifying non profit 501(c) (3) Community and Faith Based Organizations in response to their 2007 Competitive Solicitation for Sub grant Funds. Two separate Review Panels will be convened. Applications for sub grant funding will be solicited in 2007 for the following two Federal Grants:

1. 2007 Edward Byrne Memorial – Justice Assistance Grant Program

2. 2006 & 2007 Title II Part B Formula Grant

If you are qualified and interested in serving as a Review Panelist on one of the two above panels, please submit your resume and indicate which one of the two panels you wish to serve on. For applicants seeking compensation (flat rate), if you are selected, you will be requested to fillout, sign, and submit a W9 Form, DC Vendor Form, and Confidentiality Statement. Government employees are eligible to apply but cannot be compensated. Applicants may also serve on a voluntary basis. Resumes should be sent to:

John L. Hallums, Director
Office of Justice Grants Administration
1350 Pennsylvania Avenue, NW
Suite 407
Washinton, DC 20004
Attention: Review Panel Applicants

Qualified resumes must be received no later than 3:00 PM Tuesday, April 17, 2007. Applicants will be notified of their selection or non selection prior to Friday, May 4, 2007.

Review Panels will start no earlier than Monday, June 11, 2007 and must be concluded by Friday, June 22, 2007 or earlier.

DISTRICT OF COLUMBIA REGISTER

MAR 3 0 2007

DISTRICT OF COLUMBIA

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

NOTICE FOR THE HOUSING PRODUCTION TRUST FUND
ADVISORY BOARD MEETINGS

The DC Department of Housing and Community Development, in accordance with 42-2802.01 of the DC Official Code, the Housing Production Trust Fund Act of 1988 and DC Law 7-202, announces that the 2007 Housing Production Trust Fund Advisory Board meetings will be as follows:

*April 25, 2007
June 13, 2007, and
September 19, 2007

The meetings will be held at 801 North Capitol Street, N.E. Washington, DC 20002, in Suite 9000, at 9:30 a.m.

For additional information please contact Oke Anyaegbunam at (202) 442-7200.

*Please note that this meeting which was scheduled for April 18 has been moved to April 25, 2007.

Adrian M. Fenty, Mayor
Neil O. Albert, Acting Deputy Mayor for Planning and Economic Development
Victor L. Selman, Interim Director, Department of Housing and Community Development
www.dhcd.dc.gov

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Teamsters Local Union No. 730, a/w International Brotherhood of Teamsters,	
Petitioner,	PERB Case No. 06-RC-03
and	Opinion No. 836
District of Columbia Public Schools,	**FOR PUBLICATION**
Agency.	

DECISION AND ORDER

I. Statement of the Case:

On June 13, 2006, the Teamsters Local Union No. 730, a/w International Brotherhood of Teamsters, ("Teamsters Local 730 ", "Union" or "Petitioner"), filed a Recognition Petition ("Petition") in the above-captioned proceeding. Teamsters Local 730 seeks to represent, for purposes of collective bargaining, all full time and regular part-time facilities management workers employed by the District of Columbia Public Schools, Office of Facilities Management-Penn Center. The Petition was accompanied by a showing of interest and a copy of the Petitioner's Constitution. (See Board Rules 502.1(d) and 502.2)

After conducting an investigation, the Board's Executive Director determined that Teamsters Local 730 satisfied the showing of interest requirement of Board Rule 502.2. As a result, on August 25, 2006, Notices concerning the Petition were issued for conspicuous posting where notices to employees are normally located at the District of Columbia Public Schools, Office of Facilities Management-Penn Center ("DCPS"). The Notices indicated that requests to intervene and/or comments should be filed in the Board's Office no later than September 26, 2006. On September 11, 2006, DCPS confirmed that the Notices were posted and submitted a comment regarding the Petition. In its submission DCPS does not oppose the Petition. However, DCPS claims that a search of their payroll system did not reveal any employees or positions in the Office of Facilities Management identified as: administrative assistants, inspectors, building service specialist, assistant managers or deputy managers. No other comments were received.

> representatives, inspectors, building service specialists, building service managers, assistant managers, and deputy managers, excluding management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

The parties were not able to settle the issue raised by DCPS' in its August 2006 submission. Teamsters Local 730's Petition and DCPS' comment are before the Board for disposition.

D.C. Code § 1-617.09(a) (2001ed.), requires that a community of interest must exist among employees in order for a unit to be found appropriate by the Board for collective bargaining over terms and conditions of employment. An appropriate unit must also promote effective labor relations and efficiency of agency operations.

Our review of the Petition, DCPS' comment and attached exhibits reveal that there exists a dispute between the parties concerning the positions that should be included in the proposed unit. As a result, the Board cannot determine on the pleadings whether the employees in either the original proposed unit or the amended proposed unit share a common organizational structure and mission within the District of Columbia Public Schools, Office Facilities Management-Penn Center.

Also, D.C. Code § 1-617.09(b)(1) (2001ed.), provides in pertinent part as follows:

> *A unit shall not be established if it includes the following: (1) Any management official or supervisor* . . . Provided, further, that supervisors employed by the District of Columbia Board of Education, may form a unit which does not include nonsupervisors; . . . (emphasis added)

In their November 30th submission, Teamsters Local 730 lists several positions which have the phrase "manager" or "supervisor" noted in the position description. Based on the information submitted by the parties the Board cannot determine on the pleadings if any of the positions listed by Teamsters Local 730 are statutorily excluded from the proposed unit.

In view of the above, we find that we cannot determine on the pleadings whether sufficient factors exist for the Board to find that these employees share a community of interest and whether the proposed unit promotes effective labor relations and efficiency of agency operations and thereby constitute an appropriate unit under the Comprehensive Merit Personnel Act. In addition, we cannot determine if some of the positions noted in the proposed unit are supervisory or managerial. Therefore, pursuant to Board Rule 502.10(d), we are referring this matter to a Hearing Examiner.

ORDER

IT IS HEREBY ORDERED THAT:

1. Pursuant to Board Rule 502.10 (d) this matter is referred to a Hearing Examiner.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 20, 2006

II. Discussion:

In its June 13, 2006, submission, Teamsters Local 730 indicated that it seeks to represent the following proposed unit:

> All full-time and regular part-time facilities management workers, employed by the District of Columbia Public Schools, Office of Facilities Management-Penn Center, including but not limited to electronics technicians, staff assistants, construction representatives, code inspectors, administrative assistants, service center representatives, inspectors, building service specialists, building service managers, assistant managers, and deputy managers, excluding management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

DCPS does not oppose the Petition. However, DCPS claims that a search of the DCPS payroll system did not reveal any employees or positions in the Office of Facilities Management identified as: administrative assistants, inspectors, building service specialist, assistant managers or deputy managers. As a result, DCPS requested that if the Union believes that such positions exist, then the Union should provide DCPS with clarification on which employees the Union asserts occupy these positions. There were no other comments.

On November 30, 2006, Teamsters Local 730 submitted a revised proposed unit. In their November 30th submission, Teamsters, Local 730 indicated that "[i]n the interest of moving towards the soonest possible resolution of this matter, either by voluntary recognition or PERB administered election, [they were amending] . . .the proposed unit."

In their November 30th submission, Teamsters Local 730 indicated that they are seeking to represent the following amended proposed unit:

> All full-time and regular part-time facilities management workers, employed by the District of Columbia Public Schools, Office of Facilities Management-Penn Center, including but not limited to electronics technicians, staff assistants, statisticians, construction representatives, construction maintenance supervisors, code inspectors, code compliance officers, asbestos code inspectors, asbestos contract specialists, administrative assistants, service center

Government of the District of Columbia

Public Employee Relations Board

In the Matter of:	)	
American Federation of Government Employees, Local 2725,	)	
Complainant,	)	PERB Case No. 05-U-30
v.	)	
	)	Opinion No. 841
District of Columbia Department of Health and Office of Labor Relations and Collective Bargaining,	)	**FOR PUBLICATION**
Respondents.	)	

DECISION AND ORDER

I. Statement of the Case:

On April 13, 2005, the American Federation of Government Employees, Local 2725, ("Complainant", "Union" or "Local 2725") filed an unfair labor practice complaint ("Complaint") in the above-referenced case. Specifically, the Complainant alleges that the District of Columbia Department of Health ("DOH" or "Respondents") and the Office of Labor Relations and Collective Bargaining ("OLRCB"or "Respondents") violated D.C. Code § 1-617.04(a)(1) and (5) by: (1) undermining the authority of the Public Employee Relations Board ("Board") by refusing to implement a Board order; (2) failing to provide pertinent information; (3) refusing to bargain in good faith; and (4) restraining and coercing employees in the exercise of their rights. (See Complaint at p. 5). The Complainant requests that the Board order the Respondents to: (a) cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5); (b) comply with the Board's order; (c) comply with the Union's request for information; (d) post a notice to employees; (e) pay attorney fees and costs.

In an Answer filed on May 3, 2005, the Respondents: (1) denied the Complainant's allegations; (2) affirmed their willingness to negotiate stating that they met with the Union on May 2, 2005; and (3) asserted that the Union failed to appear for a scheduled meeting on April 29, 2005.

On September 7, 2005, the Respondents filed a "Motion to Dismiss" alleging that the Complainant failed to state a cause of action and that the Complaint was moot because the parties were currently following impasse procedures. (Motion to Dismiss at pgs. 4-7). In addition, the Respondents filed a document styled "Motion to Hold the Hearing in Abeyance". In their motion to hold the hearing in abeyance, the Respondents requested that this matter be held in abeyance until completion of the parties' impasse proceedings. The case was referred to a Hearing Examiner. The Hearing Examiner denied both the motion to dismiss and the motion to hold the hearing in abeyance. As a result, a hearing was held.

The Hearing Examiner issued a Report and Recommendation ("R&R") finding that the Respondents violated the Comprehensive Merit Personnel Act ("CMPA"). The Respondents filed exceptions to the R&R and the Complainant filed an Opposition. The Hearing Examiner's R&R, the Respondents' Exceptions and the Complainant's Opposition are before the Board for disposition.

II. Background

The Union filed a recognition petition with the Board seeking to represent the statistical employees at DOH's State Center for Health Statistics Administration ("SCHSA"). On April 20, 2004, the Board certified the American Federation of Government Employees, Local 2725 as the exclusive bargaining representative for a unit of twelve (12) professional SCHSA employees employed by DOH. Subsequently, on July 2, 2004, the Board determined that these SCHSA employees should be "placed in Compensation Unit 1."[1] (R&R at p. 2).

The parties anticipated the placement of the DOH, SCHSA employees into Compensation Unit 1 even before the Board's determination of the appropriate compensation unit. (See R&R at p. 2). By e-mail dated July 20, 2004, Business Agent Lola Reed asked Walter Wojcik, OLRCB Representative, what could be done to speed up the implementation of the Board's Compensation Order. (See R&R at p. 2) A week later, Mr. Wojcik informed the Union that "OLRCB's general policy is to negotiate the transition of employees and working conditions at the same time[.] [In addition, he stated that the] immediate transfer of employees to the union roles" was not required. (R&R at p. 3). There was no further communication between the parties concerning this matter. In mid-August 2004, management officials from DOH, including Monica Lamboy, Chief Operating Officer, attended a labor-management meeting with the Union to resolve outstanding grievances. At the August 2004 meeting, Union President Eric Bunn raised the issue concerning DOH's implementation of the Board's July 2, 2004 Order placing the DOH, SCHSA employees in Compensation Unit 1. In response, Monica Lamboy, Chief Operating Officer for DOH indicated that she made budgetary allowances for the placement of the affected employees into Compensation Unit

[1]Compensation Unit 1 consists of all career service professional, technical, administrative and clerical employees who currently have their compensation set in accordance with the District Service (DS) Schedule.

1. (See R&R at p. 3; and Answer, paras. 6-7, at p. 3). However, as of the date of the filing of the Complaint, the affected employees were not placed in Compensation Unit 1.

In November 2004, at the request of the Union, Councilmember Phillip Mendelson attended a meeting with Mary Leary, Director of OLRCB and Eric Bunn "in an effort to hasten the [placement] of the DOH statistical employees into Compensation Unit 1." (R&R at p. 3). Ms. Leary indicated that the Union should request a meeting in writing. By letter dated November 3, 2004, Mr. Bunn wrote to OLRCB and to Dr. Gregg, Acting Director of DOH, requesting that the parties meet as soon as possible in order to comply with the Board's July 2, 2004 Compensation Order.

Thereafter, on December 9, 2004, the parties held their first negotiating session. (See R&R at p. 3). At the December 2004 negotiation session, Ms. Leary made an offer to place the DOH, SCHSA employees on the Compensation Unit 1 salary scale effective January 2005. "Leary stated that the [SCHSA] employees would be [placed in] Compensation Unit 1 in January 2005 at the same grade they presently held, but at [a] step within the grade that most closely mirrored their current [pre-union] wages." (R&R at p. 4). Under Ms. Leary's proposal, placement into the Compensation Unit 1 salary scale would result in a lateral move. Mr. Bunn requested the proposal in writing in order to formulate a position. "At the same time, he told [Ms.] Leary that the Union was not required to negotiate about [placement]; rather, the employees were entitled to [be placed in] their Union positions [on the Compensation Unit 1 pay scale] at the identical grade and step they held before they were unionized. . . . [Ms.] Leary was unwilling to discuss the Union's position. Instead she declared that the newly-certified unit employees were not entitled to the wages that long-standing union members had earned as a result of negotiations and posed the following alternative: Local 2725 could accept [management's] unwritten proposal or litigate." (R&R at p. 4). Nonetheless, she agreed to provide documentation detailing the impact of the Respondents' proposal on the DOH statistical employees. (See R&R at p. 4).

As of December 21, 2004, the Union had not received a written proposal from Ms. Leary. As a result, Ms. Reed e-mailed Ms. Leary requesting the promised documentation within ten (10) days. The Respondents did not respond to Ms. Reed's e-mail. On January 14, 2005, the Union sent another request for the documentation. Thereafter, in March 2005, Joslyn Williams, President of the Metropolitan Washington Council, AFL-CIO, attended a meeting with Ms. Leary and Mr. Bunn regarding a number of outstanding issues affecting several AFGE Locals. At the March 2005 meeting, Ms. Leary agreed to provide the Union with a written proposal and a "crosswalk" containing "specific data showing how [the] Respondents' proposal would affect the unit employees."[2] (R&R at p. 4). Approximately two weeks later, a second meeting was held with Mr. Williams, but the documentation was not provided.

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[2]The term "crosswalk" is used by the Respondents and pertains to a "document that was supposed to reflect the wage rates the statistical employees would earn if they were placed in the Compensation Unit at a step that mirrored their present earnings." (R&R at p. 5; Tr. at p. 59).

The parties scheduled a bargaining session for April 11, 2004, but Mr. Bunn was co-chairing a Task Force meeting with management and labor representatives at about the same time. As a result, Mr. Bunn did not attend the bargaining session. That day, OLRCB delivered a proposal together with a list of the SCHSA employees to Mr. Bunn at the Task Force meeting. The proposal contained the same terms that Ms. Leary had proposed at the December 9, 2004 meeting.[3] This proposal would position the affected employees at a lower compensation level than they would enjoy if they were placed on the same nominal step they held prior to being placed on the Compensation Unit 1 pay scale. (See R&R at p. 5).

On April 13, 2005, the Union filed an unfair labor practice complaint alleging that DOH violated the CMPA by: (1) refusing to implement the Board's July 2, 2004 order which placed the newly-certified unit in Compensation Unit 1; (2) refusing to bargain in good faith; (3) failing to provide pertinent information; and (4) restraining and coercing employees in the exercise of their rights.[4] The Respondents filed an answer on May 3, 2005, denying these allegations. As a result, the matter was referred to a Hearing Examiner. Prior to the hearing, the Respondents filed a motion to dismiss and a motion to hold the hearing in abeyance.

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[3]"OLRCB made a proposal to place the SCHSA employees in Compensation Unit 1 "at their present grade but not at the same nominal step. Instead, effective as of the first period after January 1, 2005, they would be assigned to a step that provided a wage rate most closely matching their present, pre-union pay. In other words, [OLRCB's] proposal positioned the affected employees at a lower step (and correspondingly lower compensation level) than they would enjoy if they were placed on the same nominal step (and higher pay) that they held prior to [placement in Compensation Unit 1]." (R&R at p. 5). (Parenthesis in the original).

[4]After the Complaint was filed, the parties held a bargaining session for an hour on May 2, 2005. (See R&R at p. 5). At this session, OLRCB presented a crosswalk with the same proposal that Ms. Leary had made in December 2004, explaining that budgetary concerns prompted the proposal. The Union responded to OLRCB's refusal to change its initial proposal and to budgetary concerns that were raised for the first time at the May 2, 2005 meeting. "[T]he Local presented a handwritten proposal providing that the unit employees would transfer at their same grade but at the step closest to their current rate of pay on October 4, 2004." However, the counteroffer also provided that in January 2005, the affected unit employees would transfer to the nominal step he or she held on September 30, 2004 . . . and that any appropriate steps due an employee during the process would remain in effect." (R&R at p. 5 and n. 6; Tr. pgs. 245-246). The parties met again on June 24, 2005. OLRCB made a final proposal titled "Memorandum of Understanding" ("MOU") containing the Respondents' initial offer. However, the effective date of the terms of the MOU was moved from January 2005 to July 2004. In response, Local 2725 countered with an effective date of July 2, 2004, while retaining its proposed two-step placement in Compensation Unit 1. (See R&R at p. 6). Subsequently, on July 21, 2005, OLRCB sent the Union a memo explaining for the first time the methodology that it used to place the SCHSA employees to Compensation Unit 1. In August 2005, the parties commenced the CMPA impasse procedures. (See R&R at p. 6).

III. Hearing Examiner's Report and Recommendation, the Respondents' Exceptions and the Complainant's Opposition:

As a preliminary matter, the Hearing Examiner considered the Respondents' motions. In their first motion, the Respondents argued that the unfair labor practice complaint should be dismissed because the: (1) Complainant failed to state a cause of action under D.C. Code § 1-617.04, and (2) Complaint was moot since the parties were currently following the CMPA's impasse procedures. (See Motion to Dismiss at pgs. 4-7). The Complainant filed an Opposition asserting that the facts alleged, when proven, describe an unfair labor practice. (See Opposition at p. 2).

The Respondents filed a second motion requesting that the hearing be held in abeyance until completion of the impasse proceedings. In support of that motion, the Respondents argued that the underlying dispute in the Complaint would be resolved in the impasse proceedings. (Motion to Hold the Hearing in Abeyance at p. 2, citing PERB Case No. 05-I-05). The Complainant opposed the Respondents' motion, claiming that the impasse proceedings would not resolve the alleged failure to bargain in good faith. (See Opposition at p. 1). The Hearing Examiner rejected the Respondents' arguments and denied both motions.

The parties did not file exceptions to the Hearing Examiner's rulings concerning these two motions. We find that the Hearing Examiner's denial of the two motions is reasonable, supported by the record and consistent with Board precedent.[5] Therefore, we adopt her rulings.

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[5]When considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). In the present case, we believe that the Complainant's factual allegations, if proven, would constitute an unfair labor practice. As a result, we concur with the Hearing Examiner's ruling denying the Motion to Dismiss.

Concerning the Hearing Examiner's denial of the motion to hold the hearing in abeyance, we previously considered this issue in *American Federation of Government Employees, et al. v. Government of District of Columbia, et al.*, 45 DCR 8071, Slip Op. No. 502 at p. 2, PERB Case No. 97-U-01 (1996). The Respondent in that case argued that "the culmination of the impasse resolution procedures provided [in] D.C. Code § 1-617.17(f) [would] . . . render moot all the allegations contained in the [unfair labor practice] [c]omplaint". The Board disagreed, stating that the impasse procedures would not necessarily render moot all the allegations contained in the complaint. Nonetheless, the Board granted the request to hold the hearing in abeyance, noting that there was a significant, but not complete, overlap in the issues raised by the two proceedings and that "[there was no] objection [to the motion] from the [opposing

After ruling on the two motions, the Hearing Examiner identified several issues for resolution in the unfair labor practice proceeding. These issues, her findings and recommendations, the Respondents' exceptions and the Complainant's opposition, are set forth below.

1. *Did the Respondents lawfully demand that Local 2725 bargain about wages in the transfer of SCHSA unit employees to Compensation Unit 1?*

Citing D.C. Code § 1-617.04(a)(5), the Hearing Examiner noted that the CMPA makes it an unfair labor practice for an agency, upon request, to refuse to bargain collectively in good faith with an exclusive representative. The Hearing Examiner observed that this includes the requirement to negotiate over compensation at reasonable times and in good faith.[6] (See R&R at p. 7). Consistent with this finding, she focused on the issue of: "*whether DOH was obligated to place the newly-certified employees into the Compensation Unit 1 pay scale at the same grade and step they previously held, without bargaining over the wage scales with the Union.*" (R&R at p. 7).[7] (emphasis added).

The parties raised the following four issues in support of their respective positions regarding the placement of the employees into Compensation Unit 1: (1) past practice; (2) the Comprehensive Merit Personnel Act (CMPA); (3) 2002 and 2004 amendments to the CMPA; and (4) the language of the Compensation Unit 1 collective bargaining agreement.

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party]." In the present case the Board notes that: (1) the impasse procedures would not necessarily render moot all the allegations contained in the complaint in this matter, and (2) the Complainant objects to the Respondents' motion to hold in abeyance. For these reasons, we believe the motion should be denied. As a result, we adopt the Hearing Examiner's ruling denying the motion to hold in abeyance.

[6]D.C. Code § 1-617.17(b) provides in pertinent part as follows: ". . . ("management") shall meet with labor organizations ("labor) which have been authorized to negotiate compensation at reasonable times in advance of the District's budget making process to negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours, and any other compensation matters."

[7]The Board notes that management and the Union have previously negotiated a collective bargaining agreement (CBA) containing a pay scale with built-in step increases. This CBA is effective from fiscal year 2004 to 2006. (Tr. pgs. 72-73 and 109, and 116-117). In the present case, the Complainant refers to this pay scale as the "union pay scale" and asserts that the newly-certified employees should be placed on the union pay scale at their *current grade and step*, resulting in higher pay, (automatically) without bargaining over a new pay scale assignment. (Tr. p. 34). The Respondents assert that the newly-certified employees should be placed on the Compensation Unit 1 pay scale as a result of bargaining by the parties, at their *current wages, i.e.*, "at the same grade and [at] the closest step to their current salary, without loss of pay". (Tr. p. 128).

With respect to past practice, the Union's witness, Eric Bunn, testified that he has served as union president for the past fourteen (14) years. During this time, newly-certified employees were always placed into an existing compensation unit at their current grade, step and position, without bargaining over compensation. (See R&R at p. 8; Tr. at pgs. 28, 34 and 38) The Respondents countered that it was the policy and practice of OLRCB to bargain with the unions over the pay scale assignments of employees in newly-certified units when placing them into a compensation unit. (Respondents' Brief at pgs. 2, 4 and 12). In support of this contention, the Respondents' witnesses testified that between 2002 and 2004, some union locals had accepted their terms to place newly-certified employees in Compensation Unit 1 at their current rate of pay. (See Tr. at pgs. 94; 146-147 and 172).

The Hearing Examiner observed that the Respondents' witnesses had relatively short tenure in the District government. Their knowledge concerning the past practice of the parties did not extend to practices that occurred prior to their employment. Also, she found that the evidence presented by the Respondents did not establish a consistent practice. Some union locals had accepted the Respondents' terms to place newly-certified employees in Compensation Unit 1 at their current rate of pay, but others had rejected this offer. Therefore, the Hearing Examiner found that the Respondents did not establish that their position represented the past practice of the parties. Further, she noted that the testimony of the Union's witness was not directly challenged. (See R&R at p. 8). As a result, she relied on Mr. Bunn's extensive experience and his testimony that newly-certified employees were, as a matter of practice, placed into an existing compensation unit at their current grade, step and position, without bargaining over compensation. Consistent with this finding, the Hearing Examiner concluded that "Local 2725 was not obliged to bargain about pay scale assignments for the SCHSA employees on [placement into] Compensation Unit [1]." (R&R at pgs. 8-9).

In support of their position, the Respondents also relied on the provisions of the CMPA. Specifically, the Respondents maintained that to ensure funding for the salaries of the newly-certified employees, D.C. Code § 1-617.17(f) (2002),[8] requires that the parties bargain in advance of the budget cycle for the next fiscal year. (See Respondents' Brief at p. 14). The Union countered that in anticipation of the Board's certification order, Monica Lamboy had already "made budgetary allowances for the [placement] of the affected employees in [Compensation] Unit [1]". (Tr. at pgs. 45 and 54; R&R at p. 3). Therefore, DOH had previously funded the salaries for the newly-certified

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[8]D.C. Code § 1-617.17.17(f) (2002 amendment) -

> (A) *Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that negotiations shall be completed prior to submission of a budget for said year(s) in accordance with this section.*

unit. The Hearing Examiner noted that the Respondents admitted in their Answer to the Complaint that DOH had previously funded the new salaries - thereby rejecting the Respondents' position. (See Answer, Para. 8, at p. 3, R&R at p. 3).

Citing the 2002 amendments to the CMPA at D.C. Code § 1-617.17(f)(A) and (m) (2002),[9] the Respondents further asserted that the parties must negotiate working conditions and compensation matters concurrently. (See Respondents' Brief at p. 14). The Union contended that the 2002 amendments do not specifically address compensation negotiations for newly certified bargaining units assigned to an existing compensation unit. Also, the Union argued that a later amendment, the 2004 amendment, "accurately reflects the parties' past practice". (R&R at p. 8). Further, the Union relied on the legislative history of the 2004 amendments to interpret the new language in the amendment. The Hearing Examiner found that in 2002 the CMPA was silent on the issue of negotiations for newly-certified units assigned to existing compensation units. It was not until 2004 that the CMPA specifically addressed this issue. (See R&R at. P. 7).

The Hearing Examiner observed that "although the 2004 [a]mendments are not retroactive, [and do not apply to the facts of this case] the parties agree that they clarify certain provisions of the 2002 statute. In addition, the legislative history of the 2004 [a]mendment[s] is particularly useful in considering the [a]mendment's purpose regarding the scope of bargaining for newly certified units." (R&R at p. 7). As a result, the Hearing Examiner analyzed the parties' respective interpretations of the comments by Councilmember Mendelson when he introduced the 2004 amendments. Councilmember Mendelson stated as follows:

> *. . . For units placed into a new compensation unit . . . non-compensatory matters shall be negotiated simultaneous[ly] with*

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[9]D.C. Code § 1-617.17.17 (2002 amendments) -

> (f)(A) Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that negotiations shall be completed prior to submission of a budget for said year(s) in accordance with this section.
>
> (m) When the Public Employee Relations Board makes a determination as to the appropriate bargaining unit for the purpose of compensation negotiations pursuant to section [1-616.16], *negotiations for compensation between management and the exclusive representative of the appropriate bargaining unit shall commence as provided for in subsection (f) of this section.* The Mayor shall negotiate agreements concerning working conditions at the same time as he or she negotiates compensation issues. [New language in italics].

compensation unit. (R&R at pgs. 7-8). As a result, the Hearing Examiner determined that "Local 2725 [had no obligation] to bargain about pay scale assignments for the SCHSA employees [when placing them in] Compensation Unit [1]". (R&R at p. 9).

Finally, the parties made arguments pertaining to the Compensation Unit 1 collective bargaining agreement (CBA). "Article 1, Wages" in the Compensation Unit 1 CBA, states that "employees who are actively employed in Compensation Unit 1 . . . as of the date of the approval of this agreement [August 21, 2003]" are entitled to the salary increases contained in the agreement. (CBA at pgs. 2-3). The Respondents maintained that this provision restricts coverage of the Compensation Unit 1 CBA to employees who were actively employed in Compensation Unit 1 when the CBA was approved. They argued, therefore, that the Compensation Unit 1 CBA does not cover employees in newly-certified bargaining units who were not actively employed at the time the CBA was approved. (See Respondents' Brief at p. 3; Tr. at p. 109).

The Union countered that "failure to assign salaries in accordance with the already negotiated pay scale [in the Compensation Unit 1 CBA] . . . commensurate with the [salary] of other employees in the same DS series and grade would create a two-tier wage system for the same job in the District government." (Complaint at p. 3). Further, Bunn testified on behalf of the Union that "[t]he practice has been [that] employees [who are] hired after the compensation agreement [becomes effective,] receive the same exact wages . . . as the employees [who were actively employed as of the date of the approval of the agreement]." (Tr. at pgs. 31-32).

The Hearing Examiner did not directly address the parties' arguments pertaining to Article 1 of the Compensation Unit 1 CBA.[11] Nonetheless, she rejected the Respondents' argument by concluding that "bargaining for newly-certified units [assigned to an existing compensation unit] should address procedural, not substantive, wage issues. . . . [Specifically, she concluded that] Local 2725 was not obliged to bargain about pay scale assignments for the SCHSA employees on [placement into] Compensation Unit [1]." (R&R at pgs. 8-9).

Exceptions

The Respondents take exception to the Hearing Examiner's findings that "Local 2725 [had no obligation] to bargain over the pay scale assignments for SCHSA employees on [placement] to Compensation Unit [1]". (Exceptions at p. 2). The Respondents assert that the Hearing Examiner: (1) incorrectly relied on the legislative history of the 2004 amendment in D.C. Code § 1-617.17(f)(1)(A)(iii) when interpreting the 2002 amendment; (2) incorrectly relied on the evidence presented by the Union concerning the past practice of the parties; (3) failed to give due weight to OLRCB's actual conduct starting in April 2005; and (4) committed reversible error by finding that

[11]The Board addresses this issue below, under "Exceptions" at n. 15.

the Union had no obligation to bargain over "the [placement] of the SCHSA employees to the Compensation Unit 1 pay schedule".[12]

The Respondents argue that the legislative history of the 2004 Amendments became effective after the facts of this case occurred. (Exceptions at p. 2). The Board finds that the 2004 amendments to the CMPA are not applicable here. We note that although the amendment is entitled the "Labor Relations and Collective Bargaining Amendment Act of 2004" ("2004 amendment"), it became effective April 12, 2005. (See D.C. Code § 1-617.17(f)(1)(A) (2005 ed.)). With the exception of an overtime provision, the amendment was not made retroactive. The Complaint in this matter was filed almost concurrently, on April 13, 2005. However, the material facts in this case occurred prior to the effective date of the amendment. As a result, we conclude that the amendment does not apply to the facts of this case. However, in their briefs to the Hearing Examiner, both the Respondents and the Complainant made arguments based on the 2004 amendments.[13] (See n. 10, *supra*; Respondents' Brief at p. 14; Tr. at pgs. 103-105; Complainant's Brief at pgs.16-17). Thus, the Respondents' argument that the Hearing Examiner improperly relied on the legislative history of the "2004 amendment", is inconsistent with their earlier arguments. In light of this, we find that the Hearing Examiner properly considered these arguments in reaching her conclusions in this matter.

Next we turn to the Respondents' arguments that the Hearing Examiner incorrectly relied on the evidence presented by the Union concerning the past practice of the parties and failed to give due weight to OLRCB's actual conduct of the negotiations starting in April 2005. We believe that the Respondents are merely disagreeing with the findings of the Hearing Examiner and asking this Board to adopt the Respondents' interpretation of the facts. However, we have "previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." *American Federation of Government Employees, Local 872*, 38 DCR 6693, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Also see, *University of the District of Columbia Faculty Association/NEA v. University of the District of*

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[12]See Exception No. 1, at p. 1; "Memorandum in Support of Respondents' Exceptions" ("Exceptions") at pgs.2-5 and 8-11.

[13]The Respondents argued as follows: "The statute in effect on July 2, 2004 when the [Board] placed the affected employees in Compensation Unit 1, required the [p]arties to negotiate the terms of the transfer . . . The statute was later clarified in the following manner: . . . [citing] D.C. Official Code § 1-617.17(f)(1)(iii)(Pocket part 2005 ed.) . . . .[The Respondents maintained that][th]e statutes were enacted to ensure the government's ability to fund [salaries] in agreements negotiated." (Citation omitted). (Respondents' Brief at p. 14). Further, in response, the Complainant argued that "[w]hether the 2002 or the 2004 amendments are applied, the conclusion that bargaining is limited to process-oriented details and not wage level and amounts[,] remains the same. Neither the 2002 nor the 2004 amendments expressly require negotiation over wage level or change this type of [placement] as described by Bunn." (Complainant's Brief pgs. 16-17).

Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case Nos. 88-U-33 and 88-U-34 (1991). In the present case, the Board has reviewed the relative weight attributed to the evidence in support of the Hearing Examiner's findings. We find that the Hearing Examiner fully considered all relevant issues of fact when determining that there was no obligation to bargain over the placement of SCHSA employees to the Compensation Unit 1 pay scale. Therefore, we conclude that this exception lacks merit and adopt the Hearing Examiner's findings.

In conclusion, the Respondents assert that the Hearing Examiner committed reversible error by finding that the Union had no obligation to bargain over "the [placement] of the SCHSA employees to the Compensation Unit 1 pay schedule". (Exceptions at p. 2). In support of this claim, the Respondents maintain that: (a) the CMPA at D.C. Code at § 1-617.17 (2002 ed.) requires the parties to negotiate over compensation and working conditions simultaneously and in advance of the budget cycle;[14] and (b) only employees actively employed in Compensation Unit 1 as of the date of the approval of the agreement are entitled to the salaries contained in the Compensation Unit 1 CBA.[15] (Exceptions at pgs. 6-7). The Respondents contend, therefore, that the Hearing Examiner's findings are contrary to the CMPA. However, this is just a repetition of the arguments raised before the Hearing Examiner. We find that the Hearing Examiner fully considered and rejected these arguments in reaching her conclusions of law. As a result, we believe that the Respondents' exception amounts to a disagreement with the Hearing Examiner's findings. As previously stated, we have held that a mere disagreement with the Hearing Examiner's findings is insufficient to find reversible error. See *Fraternal Order of Police/Department of Corrections Labor Committee and D.C. Department of Corrections*, 49 DCR 8937, Slip Op. No. 679 at p. 16, PERB Case No. 00-U-36 and 00-U-40 (2002); *Glendale Hoggard v. District of Columbia Public Schools,* 46 DCR 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996). Furthermore, this Board will not turn aside the findings of the Hearing Examiner where they are reasonable and supported by the record, as here. In light of the above, we conclude that the Respondents' exceptions lack merit.

The Hearing Examiner next considered the following issues:

2. *"Given the totality of the circumstances did [the] Respondents violate [D.C. Code] § 1-617.0[4](a)(1) and (5)?"*

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[14](Exceptions Nos. 1, 3, 4, 10 at pgs. 2-3; "Memorandum in Support of Respondents' Exceptions" at pgs. 1-6).

[15]The Board notes that this argument is inconsistent with the only bargaining proposal made by the Respondents to the Union. In their proposal, the Respondents were willing to place the newly-certified employees in Compensation Unit 1, but on the Respondents' own terms. The Respondents cannot now claim that the collective bargaining agreement prevents the parties from placing the newly-certified employees in Compensation Unit 1.

3. *"Did the Respondents present their wage scale proposal to the Union on a "take it or leave it" basis?"*

4. *"Did the Respondents fail to meet with the Union in a timely manner?"*

5. *"Did the Respondents unlawfully delay delivering information to the Union for a prolonged period of time?"* (See R&R at p. 6).

The Hearing Examiner noted that on December 9, 2004, the Union made a request for a written proposal with a "crosswalk". The Hearing Examiner found that the requested information was not provided until five (5) months later, and only after the Union filed the complaint in this matter. (R&R at p. 11). She concluded that "OLRCB and DOH failed to supply the Local with clearly relevant information in a timely manner in violation of D.C. Code § 1-617.04(a)(1) and (5) of the CMPA."[16] (R&R at p. 11).

Noting that determining good faith, or its absence, in specific situations requires an analysis of the totality of the circumstances on a case by case basis, the Hearing Examiner considered the entire record.[17] She determined that the Respondents did not fulfill their obligation to meet at reasonable times, finding that the Respondents engaged in dilatory conduct by failing to meet for over five (5) months without giving any justification for the delay.[18] (R&R at p. 10). In addition, the Hearing Examiner found that on December 9, 2004, the Respondents' conduct demonstrated "a take it or leave it attitude, reflecting a mind closed to compromise. [Furthermore,] . . . throughout the eight months that preceded their declaration of impasse, the Respondents never wavered from their insistence that the SCHSA employees had to be [placed on] the union wage schedule according to their own terms." [R&R at p. 11]. Finally, the Hearing Examiner observed that "[the] Respondents engaged in unseemly haste to arrive at impasse soon after the parties' third meeting." (R&R at p. 12). The Hearing Examiner concluded that the Respondents' actions constituted bad faith in violation of D.C. Code § 1-617.04(a) (5) and (1) of the CMPA. Although she determined that the Respondents' conduct was in violation of the CMPA, the Hearing Examiner nevertheless found that their conduct

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[16]Citing *Rhodes St. Clair Buick, Inc.*, 242 NLRB 1320, at 1323 (1979).

[17]Citing *Continental Ins. Co. v. NLRB*, 495 F.2d 44, at p. 50 (CA 2, 1974). *See* also *Atlantic Hilton and Tower*, 214 NLRB 1103 (1984), stating that "the key to good faith bargaining requires that the parties enter into negotiations with a serious intent to adjust differences and to reach an acceptable common ground." (R&R at p. 10)

[18]*See Richard Mellow Electrical Contractors Corporation*, 327 NLRB 1112, 1116 (1999).

did not "unlawfully interfere with the employees' right to engage in collective bargaining".[19] (R&R at p. 12).

The Respondents take exception to the Hearing Examiner's findings that: (1) "the Respondents violated the good faith requirement of the CMPA"; (2) "the Respondents' failure to meet with Local 2725 constitutes dilatory conduct"; (3) "the Respondents engaged in take it or leave it bargaining" (Exceptions at p. 2); (4) "the Union presented the Respondents with a valid request for bargaining no later than April 20, 2004;[20] and (5) the "Respondents' failure to meet with the Union and engage in good faith bargaining from April 20 to 1(sic) December 9, 2004, and thereafter, until May 2, 2005, violated [§] 1-617.04(a)(1) and (5) of the CMPA".[21] The Respondents assert that the Hearing Examiner "failed to review the totality of OLRCB's conduct" when bargaining with the

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[19]The Hearing Examiner stated that "[her] conclusion[s] concern only those units that [the Board] certified and placed into Compensation Unit [1] prior to the effective date of the 2004 Amendments to the CMPA." (R&R at p. 9, ft. 14).

[20]Exceptions at p. 3; R&R at p. 13. At p. 13 of the R&R, in the "Conclusions of Law" the Hearing Examiner stated: "3. The Union presented Respondents with a valid demand for bargaining no later than *April 20, 2004.*" Here, the Respondents are challenging this date. On April 20, 2004, the Board certified the SCHSA bargaining unit for conditions and compensation bargaining. However, the Board finds that this certification did not create a duty to bargain over compensation. We conclude that pursuant to D.C. Code § 1-617.17(m), it is the date of the Board's Compensation Order determining the appropriate compensation unit which gives which gives rise to compensation bargaining. See *American Federation of Government Employees, Local 1403 v. Government of the District of Columbia Office of Corporation Counsel, and Office of Labor Relation and collective Bargaining*, __ DCR __ ( ), Slip Op. No. 805 at p. 5, PERB Case No. 02-U-28 (November 30, 2005), (stating that "compensation bargaining cannot begin until the Board has established an appropriate compensation unit for affected employees.") Here, the Board's Compensation Order is dated July 2, 2004. The Hearing Examiner found that the Union made a demand for bargaining even before this date, on April 20, 2004, erroneously relying on this date as the date which gave rise to a duty bargain over compensation.

Shortly after July 2, 2004, by e-mail dated July 20, 2004, the Union, through Lola Reed, asked Walter Wojcik, at OLRCB, what could be done to speed up the implementation of the Board's Compensation Order. (See R&R at p. 2) In view of the evidence presented, the Board finds that this constitutes a demand for bargaining. Therefore, we find that pursuant to the requirements of D.C. Code § 1-617.17(f) (1)(A)(I), the Union made a written demand for bargaining on July 20, 2004. Nevertheless, the Hearing Examiner's error in citing the wrong date (April 20, 2004) does not materially affect her analysis of the bargaining relationship of the parties, nor does it change the outcome of this case or the remedy granted by this Board.

[21]Exceptions at p. 3, R&R at p. 13.

First, the Complainant has requested attorney fees. "[This] Board has held that D.C. Code § 1-617.13 which expressly permits the Board to require the payment of reasonable costs incurred by a party, does not include attorney fees. Nor are we properly authorized to provide attorney fees elsewhere in the Code." *Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 8, PERB Case No. 95-U-02 (1995). See also, *International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op No. 322, PERB Case No. 91-U-14 (1992); and, *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). Therefore, the Complainant's request for attorney fees is denied.

The Complainant has also requested that reasonable costs be awarded. The Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs, stating:[25]

> First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.
>
> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. *Id.* at pgs. 4-5.

In the present case, it is clear from the record that the Respondents engaged in dilatory conduct for over five (5) months by failing to meet with the Union and not complying with the Union's reasonable requests for information, without giving any justification for this delay. The Respondents engaged in "take it or leave it" bargaining, insisting on their proposal for new salaries.

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[25]The Board has made it clear that attorney fees are not a cost.

They argued that the law required that the new salaries be negotiated in advance of the budget cycle to ensure appropriate funding although they admitted in their response to the complaint that DOH had allocated the necessary funds prior to the Board's July 2, 2004 Compensation Order.

The Board concludes that: (1) the Respondents' actions' were undertaken in bad faith, and (2) a reasonably foreseeable result of the Respondents' conduct was the undermining of the union among the employees for whom it is the exclusive bargaining representative. *Id.* We believe that awarding costs in this case is in the interest of justice and consistent with our holding in *AFSCME, Council 20, Id.* See also, *Teamsters Local 639 and 670, International Brotherhood of Teamsters v. District of Columbia Public Schools*, Slip Op. No. 804, PERB Case No. 12-U-16 (2005).

The award in this matter shall be retroactive to July 2, 2004, the date of the Board's determination to place the employees in the newly-certified SCHSA bargaining unit in Compensation Unit 1.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health ("DOH") and the Office of Labor and Collective Bargaining ("OLRCB"), their agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.) by refusing to bargain in good faith upon request with the American Federation of Government Employees, Local 2725 ("the Union").

2. DOH and OLRCB, their agents and representatives, shall cease and desist from refusing to bargain in good faith by failing to timely provide a proposal with a "crosswalk" requested by the Union on December 9, 2004, in conjunction with implementing the Board's Compensation Order to place the SCHSA compensation bargaining unit in Compensation Unit 1.

3. DOH and OLRCB shall within thirty (30) days of the issuance of this Decision and Order provide the Union with the requested information to the extent that this information is not moot.

4. DOH and OLRCB, their agents and representatives, shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act ("CMPA") in any like or related manner.

5. DOH and OLRCB shall within thirty (30) days of the issuance of this Decision and Order place the SCHSA employees in the Compensation Unit 1 pay scale, effective July 2, 2004, at the same nominal grade and step they held on that date, and shall

provide back pay sufficient to make them whole for all compensation lost since that date, including all scheduled increases under the Compensation Unit 1 collective bargaining agreement.

6. DOH and OLRCB shall post conspicuously within ten (10) days from the service of this Decision and Order, the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

7. DOH and OLRCB shall notify the Public Employee Relations Board ("PERB"), in writing, within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. In addition, DOH and OLRCB shall notify PERB of the steps it has taken to comply with the directives in paragraphs 3, 5, and 6 of this Order.

8. The Union shall submit to the PERB, within fourteen (14) days from the date of this Decision and Order, a statement of actual costs incurred processing this complaint. The statement of costs shall be filed together with supporting documentation. DOH and OLRCB may file a response to the statement within fourteen (14) days from service of the statement upon it.

9. DOH and OLRCB shall pay the Union reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.

10. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D. C.

July 17, 2006

PERB Public Employee Relations Board

Government of the District of Columbia

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, STATE CENTER FOR HEALTH STATISTICS ADMINISTRATION, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 841, PERB CASE NO. 05-U-30 (July 17, 2006)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from failing and refusing to bargain collectively in good faith with in violation of D.C. Code § 1-617.04(a) (1) and (5) by the actions and conduct set forth in Slip Opinion No. 841.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Department of Health

Date: _____ By: _____
Director

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

July 17, 2006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police /Metropolitan Police Department Labor Committee,	
Petitioner,	PERB Case No. 04-N-03
and	Opinion No. 842
Metropolitan Police Department,	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The parties are engaged in bargaining for a successor collective bargaining agreement. The Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP", "Union" or "Petitioner"), asserts that by correspondence dated January 15, 2004, the Metropolitan Police Department ("MPD" or "Respondent") served on the Petitioner responses to proposals previously submitted by the Petitioner in connection with negotiations for a successor collective bargaining agreement. The Respondent declared numerous proposals to be non-negotiable. As a result, on February 26, 2004, the Petitioner filed this Negotiability Appeal ("Appeal") pursuant to Board Rule 532.[1] The Respondent filed an Opposition on March 3, 2004. The Respondent asserts that the existing language as well as the Union's proposed changes are non-negotiable.

Pursuant to Board Rule 532, the Board has jurisdiction over Negotiability Appeals. There are seventeen (17) proposals concerning conditions of employment that have been challenged as non-negotiable by the MPD.

[1]PERB Rule 532.1 provides as follows: "If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board."

The specific issue presented by the Petitioner in this appeal concerns whether the challenged provisions of the Union's proposals are negotiable subjects of bargaining. Specifically, the following proposals are at issue: (1) Article 11 - Use of Department Facilities; (2) Article 12, § 2, § 9, § 11, § 14, § 16 - Discipline Provisions; (3) Article 14, § 1 and § 3 - Transfers ; (4) Article 16.2 § 3 - Employee Records; (5) Article 19, Part B, § 3 and Part C, § 2(2)(g) - Grievance Procedures; (6) Article 26 - Details; (7) Article 27 - Performance Evaluations; (8) Article 28 - Polygraph Tests; (9) Article 30, §1, § 2 and § 3 - Overtime; (10) Article 38 - Skills Premium; and (11) Article 39, § 1 and § 3 - Uniform Allowance.

II. Discussion

The "Management Rights" provision found in the Comprehensive Merit Personnel Act ("CMPA") at D.C. Code § 1-617.08(a) (2001 ed.), establishes certain subjects that are management rights. In addition, D.C. Code § 1-617.08(b)(2001 ed.) provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter." As a result, there is a presumption of negotiability. See *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 3, PERB Case No. 95-N-01 (1995). However, the Board has stated that "in view of specific rights reserved solely to management under . . . D.C. Code § 1-617.08(a), the Board must be careful in assessing proffered broad interpretation of either subsection (a) or (b)." *Id.* at p. 4.

Also, in *University of the District of Columbia Faculty Association/National Education Association and University of the District of Columbia*, 29 DCR 2975, Slip Op. No. 43 at p. 3, PERB Case No. 82-N-01 (1982), this Board adopted certain principles concerning mandatory, permissive and illegal subjects of bargaining.[2]

III. Findings of the Board

The Union's proposals which the Respondent contends are nonnegotiable are set forth below. They are followed by the positions of the parties and the Board's ruling. The proposals on which the

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[2]The Board stated as follows: "[i]t is a critical question in collective bargaining whether particular contract proposals are to be considered (i) mandatory, (ii) permissive, or (iii) illegal subjects of bargaining. The U.S. Supreme Court established and defined in *National Labor Relations Board v. Borg-Warner Corp.*, 356 U.S. 342 (1975), these three categories of bargaining subjects as follows: [m]andatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects over which the parties may not legally bargain. The Court held further that mandatory subjects are those which are determined to be within the scope of wages, hours and terms and conditions of employment and that the parties may bargain on these subjects to the point of impasse. Bargaining on permissive subjects, however, was held to be discretionary and neither party is required to negotiate in good faith to agreement or impasse. These principles are generally accepted today in both private and public sector labor relations." *Id.*

Board has made a determination are discussed first, then those proposals where the Board requests additional information from the parties are listed. All proposed changes are italicized, omitted language is identified in brackets and new or replacement language is in bold print.

Article 11: "Use of Department Facilities"

> Section 4. ["With specific approval by the Commanding Officer,"] The Union may utilize Departmental mailboxes, teletype, electronic mail and the daily dispatch **to disseminate information to union members provided the message sought to be transmitted pertains to official union business. Such messages may be sent to all union members throughout the Department, or within specific commands. The Chairman or his designee must sign in writing, or by electronic simulation, all messages that originate from the Union. A management official of the appropriate rank, which depends on the distribution sought, may review the message before it is distributed. The management official may disallow the issuance of the message if it does not pertain to matters relating to official union business, but may not disallow the issuance of the message based on a disagreement with the contents of the message.**

The Petitioner asserts that this proposal is negotiable because it allows for the Union's use of the Employer's facilities without improperly asserting any absolute entitlement for use of such facilities. In support of its position, the Petitioner cites the *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at pgs. 15-16, PERB Case No. 95-N-01 (1995). In that case, the Board held that use of office space by teachers was negotiable.

The Respondent counters that this subject is nonnegotiable because it requires management to impermissibly assist the Union in violation of the CMPA at D.C. Code § 1-617.04.

The Board finds that the Petitioner's proposal pertaining to Article 11 is negotiable based on the general negotiablity presumption found in the CMPA that "[a]ll matters shall be deemed negotiable except those proscribed by [D.C. Code § 1-617.08(a)]". *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 4, PERB Case No. 95-N-01 (1995); see also, *Committee of Interns and Residents and District of Columbia General Hospital Commission*, 41 DCR 1602, Slip Op. No. 301 at n. 2 and p. 6, PERB Case No. 92-N-01 (1992).

Article 12 § 2: "Discipline"

> *Section 2 - The parties recognize the need for discipline to be*

> *investigated and administered both expeditiously and fair[l]y, while avoiding even the appearance of impropriety, unfairness or arbitrariness. The parties agree that a system in which command authority, other than the Chief of Police, is exercised directly over both the members conducting investigation that could result in discipline and the members tasked with administering discipline based on the result of the investigation, gives rise to an appearance and possibility of impropriety, unfairness or arbitrariness. Therefore, the parties agree that the members tasked with administering discipline and member tasked with conducting investigations that could result in discipline shall be assigned to separate commands under the authority of two different Assistant Chief of Police.*

The Petitioner argues that this proposal is procedural and merely seeks to ensure compliance with the legally imposed "for cause" standard found in D.C. Code § 1-616.51, by separating the departmental investigative and administrative disciplinary functions.

The Respondent counters that this proposal infringes on the right of management under the CMPA to determine its organization.

The Board finds that Article 12 § 2.2 is nonnegotiable. Although disciplinary procedures are usually negotiable, the Board finds that this proposal infringes on management's right to determine its organization under D.C. Code § 1-617.08(a)(2). Therefore, the above proposal is nonnegotiable.

Article 12 § 9: "Discipline"

> *Section 9 - If management does not provide the employee with a written decision within the allotted period of time, the matter shall be considered settled in favor of the employee and no discipline may be imposed upon the employee by the Department. The Union and the employee shall be notified in writing that the matter has been dismissed due to the violation of the established time limits.*

The Petitioner contends that the above proposal is procedural and merely seeks to negotiate a remedy for violating established time limits. In this regard, the Union cites *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995), for the proposition that a proposal is nonnegotiable *if* it inserts a standard limiting the exercise of a management right. In keeping with this principle, the Petitioner argues that this proposal does not limit management's right to discipline.

The Respondent maintains that this proposal infringes on the right of management to

discipline its employees whenever the established time limits are not met. The Respondent cites *Washington Teachers' Union and. D.C. Public Schools, Id.*, at p. 8, in support of its position that the attempt to limit a management right "by establishing any standard at all where no standard exists is nonnegotiable".[3] (Opposition at p.6).

The Board finds that Article 12 § 9 is negotiable. The Board has held that D.C. Code § 1-617.08 (a)(2) provides as a sole management prerogative, the right to "suspend, demote, discharge, or take other *disciplinary* action against employees for cause." *Washington Teachers' Union and D.C. Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 11, PERB Case No. 95-N-01 (1995). However, the Board has also held that procedural matters concerning discipline are negotiable. *Id.* at p. 12. Therefore, the Board finds that the proposal pertaining to Section 9 is procedural in nature because it provides a remedy for failure to follow the established procedures. As a result, the Board concludes that the above proposal is negotiable.

Article 12 § 11: "Discipline"

> Section 11 - [omit the following language: "The appeals allowed by Section 6 of this Article shall not serve to delay the effective date of the decision by the Department."] and add:
> **No discipline shall be implemented pursuant to this article until affirmed on appeal to an arbitrator or the Office of Employee Appeals (OEA), if such avenues of appeal are available and the employee and/or Union has not waived such an appeal. The decision of an arbitrator or the OEA shall be enforceable upon issuance and any disciplinary action approved by an arbitrator or the OEA shall be imposed no later than sixty (60) days following that decision. If the Department fails to act to impose discipline within this 60-day period, no discipline shall be imposed.**

The Petitioner argues that this proposal is procedural in nature. Therefore, it poses no limitation on management's right to discipline where the termination is subject to a due process review through the arbitration process.

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[3]In *Washington Teachers' Union,* at page 9, *Id.*, the proposal stated as follows: "Involuntary transfers shall be made for just cause including but not limited to: reduction in staff due to loss in enrollment, reduction or elimination of programs, loss of funds, failure to meet minimum class size, or closing of buildings. Involuntary transfers shall not be made for disciplinary reasons". The Board held this proposal to be nonnegotiable because "[the 'just cause' standard] . . . limits [management's rights] by establishing any standard at all where no standard exists."

The Respondent argues that this proposal seeks to dispossess management of a statutory right to discipline employees.

The Board finds Article 12 § 11 is nonnegotiable. D.C. Code § 1-617.08(a)(2) provides that management shall retain the sole right to "suspend, demote, discharge, or take other disciplinary action against employees for cause". Specifically, the above proposal concerning Article 12, § 11 provides that "[n]o discipline shall be implemented . . . until [it is] affirmed on appeal to an arbitrator or the Office of Employee Appeals (OEA)". The Board finds that this proposal "limits management's right to discipline" because it "establishes [a] standard where none exists." *Washington Teachers' Union and District of Columbia Public Schools, Id.* at p. 8. Furthermore, this proposal would interfere with management's statutory right to discipline employees by preventing management from imposing disciplinary action under certain circumstances. As a result, the Board concludes that Article 12 § 11 is nonnegotiable.

Article 12 § 14: "Discipline"

> Section 14 - An employee shall be given administrative leave of up to [omit: "ten (10)"] **twenty-four (24)** hours to prepare for his/her defense against any proposed discharge or suspension of more than thirty (30) days[;] [omit: "four (4)"] **sixteen (16) hours** to prepare his/her defense against any proposed fine or suspension of (10) days through thirty (30) days; [omit: "two (2)"] **eight (8) hours** to prepare his/her defense against any proposed fine/suspension of less than ten (10) days. If the employee requests the assistance of a Union employee representative, the representative shall be granted official time within his/her regularly scheduled hours up to the same amount of time as the employee he/she is representing.

The Petitioner acknowledges that this proposal is nonnegotiable to the extent that it proposes administrative leave in excess of the ten (10) hour limitation in D.C. Code § 1-612.03(q).

The Respondent claims this proposal interferes with its statutory right to determine internal security. Furthermore, the proposal exceeds the provisions of the CMPA, cited above, by more than two (2) hours.

The Board finds that the above proposal is nonnegotiable because this issue is addressed in the CMPA. Specifically, D.C. Code § 1-612.03(*q*) allows "up to 10 hours of leave for the purpose of responding to adverse actions". Therefore, it is clear that ten (10) hours of leave is the statutory limit. This Board has held that "when one aspect of a subject matter, otherwise generally negotiable in other respects, is fixed by law, e.g., the CMPA, that aspect is nonnegotiable." See *Teamsters Local 639 and 730 and District of Columbia Public Schools*, 43 DCR 7014, Slip Op. No. 403 at p. 4, PERB Case No. 94-N-06 (1994).

Article 14 § 1: "Transfers"

> Section 1 - Employee(s) may be transferred from one Division or District to another for the efficiency of the service of the Department. The employee(s) shall be informed in writing by an official of the Department of the reason for his/her transfer, unless the transfer was initiated at the request of the employee. The reason given will entail an explanation which will elaborate on why the transfer is for the efficiency of the service. Such elaboration will not be the basis of a grievance by the transferred employee or any other employee affected unless it conflicts with Section 3 of this Article.

The Petitioner argues that the above proposal concerning transfers is negotiable because it is procedural and places no limitation on management's right to transfer. Citing *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450 at p. 9, PERB Case No. 95-N-01 (1995), the Petitioner asserts that "PERB has held that Management's decision to exercise its right . . . to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodations for employees transferred." The Petitioner claims that this proposal is merely a notice provision.

The Respondent maintains that this provision is nonnegotiable because it improperly creates a standard (i.e., "efficiency of the service") that does not exist in law concerning the exercise of a management right under D.C. Code § 1-617.08(a)(2). Management cites *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450, at p. 8, PERB Case No. 95-N-01 (1995), asserting that the Board has held that an attempt to limit a management right "by establishing any standard at all where no standard exists" is nonnegotiable. Citing PERB Case No. 90-N-02 *et al*).[4]

The Board finds that Article 14 § 1 is nonnegotiable. D.C. Code § 1-617.08(a)(2) states that management shall retain the sole right to "transfer . . . employees in positions within the agency". In *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools,* 38 D.C. Reg. 6693, Slip Op. No. 263 at p. 11, PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1991), the

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[4]We have held that management's decision to exercise its sole rigiht under D.C. code § 1-617.08(a)(2) to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodations for employees transferred. See, *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools,* 38 DCR 116, Slip Op. No. 259, (Slip Op. 263, Proposal No. 9), PERB Case Nos. 90-N-02, 90-N-03 and 90-N-04 (1990).

Board held nonnegotiable a proposal stating that: "involuntary transfers or details shall be based on operational requirements . . . except in emergencies and in cases where it would create a hardship on the employee and/or the operations at the work site [because the provision placed] absolute limitations on management's sole right to transfer that were incompatible with D.C. Code § 1-617.08(a)(2)." Consistent with our previous holding, the Board finds that the Union's proposal concerning Article 14, § 1, limits the reasons for which an employee may be transferred and thereby places an improper restraint on management's right to transfer employees. Therefore, the proposal is nonnegotiable.

Article 14 § 3: "Transfers"

> Section 3 - Transfers or reassignments will not be used in lieu of discipline but may form part of a disciplinary action as provided under Article 12, Section 13, Discipline, and except the Chief of Police or the Acting Chief of Police may transfer a member in a review of an appeal of adverse action in lieu of any other penalty imposed. This decision by the Chief constitutes final agency adverse action which may be further contested outside the agency as provided in other applicable articles of this agreement.

The Petitioner argues that the above proposal does not compromise management's right to transfer or discipline employees, but acknowledges that transfers may be used as part of a disciplinary measure. Also, the Union states that the parties have previously negotiated similar language. The Union further asserts that the Board looks at the parties' current and prior agreement when there is a close question of negotiability. Citing *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450 at pg. 8, PERB Case No. 95-N-01 (1995), (where the Board "looked to the parties' current and prior agreement when it is a close question whether a matter is a required subject of bargaining.")

The Respondent finds objectionable that portion of the above proposal which provides that: "[t]ransfers or reassignment will not be used in lieu of discipline but may form part of a disciplinary action as provided under Article 12, [Section] 13", arguing that this is not a standard found in the law. Management maintains that this proposal is non-negotiable because under the CMPA management may transfer employees for any legal reason, including as a disciplinary measure. The Respondent asserts that the disputed language limits management's right to transfer and is therefore contrary to *Washington Teachers' Union and District of Columbia Public Schools, Id.*

The Board finds that Article 14 § 3 is nonnegotiable. In *Washington Teachers' Union and District of Columbia Public Schools, Id.,* at page 9, the Board considered the following proposal:

> Involuntary transfers shall be made for *just cause* including but not limited to: reduction in staff due to loss in enrollment, reduction or elimination of programs, loss of funds, failure to meet minimum class

> size, or closing of buildings. Involuntary transfers shall not be made for disciplinary reasons". (emphasis added)

In *Washington Teachers' Union,* the Board held the above proposal to be nonnegotiable. Specifically, in *Washington Teachers' Union* the Board found that: "[the proposed 'just cause' standard] . . . limits [management's rights] by establishing any standard at all where no standard exists."[5] Consistent with Board precedent, we conclude that Article 14 § 3 is nonnegotiable because it limits the reasons for which an employee may be transferred and thereby places an improper restraint on management's right to transfer employees. See *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450 at pg. 8, PERB Case No. 95-N-01 (1995).

Article 19, Part B: "Grievance Procedure"

> Section 3 - A grievance not responded to by the appropriate management representative within the time limits specified at any step shall [delete: "enable the employee to pursue the grievance at the next higher step of the procedure"] ***constitute satisfactory settlement of the grievance in favor of the employee with any alleged violation against the member being discharged wholly without the issuance of any discipline, and shall not be subject to any type of appeal by the Department, nor shall the Department be entitled to pursue the disciplinary proceedings further.***

The Petitioner asserts that the above proposal addresses the procedures to be used when submitting a disciplinary action to grievance arbitration review. In support of its position, the Petitioner cites *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450 at pgs. 12-13, PERB Case No. 95-N-01 (1995). Also, the Petitioner maintains that the proposal does not infringe on management's right to discipline employees.

The Respondent argues that the proposal would cut off management's right to impose discipline if time limits were not met. The Respondent contends that this proposal creates a new standard and a bar to the exercise of a management right and is therefore non-negotiable. The Respondent relies on a ruling by the Superior Court of the District of Columbia in *District of*

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[5]See, also *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools,* 38 DCR 6693, Slip Op. No. 263 at p. 11, PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1991), where the Board held nonnegotiable a proposal stating that "involuntary transfers or details shall be based on operational requirements . . . except in emergencies and in cases where it would create a hardship on the employee and/or the operations at the work site" - because the provision "[placed] absolute limitations on management's sole right to transfer that are incompatible with D.C. Code § 1-61[7].08(a)(2)."

Columbia Metropolitan Police Department vs. Public Employee Relations Board, **01 MPA 19** (September 11, 2002), where the judge held that an untimely response did not bar the imposition of discipline.[6] However, the Respondent acknowledged that there was another ruling by the Superior Court in *District of Columbia Metropolitan Police Department vs. Public Employee Relations Board* 01-MPA-18 (September 17, 2002), where another judge ruled that an untimely response was a bar to imposing disciplinary action.

The Board finds that Article 19, Part B, § 3 is negotiable. We believe that this proposal is procedural in nature and simply addresses the timeliness of the grievance process and the disciplinary process. Moreover, it does not prevent management from implementing disciplinary action.[7] Specifically, the proposal to dismiss disciplinary action when management fails to adhere to the time limits in the appeal process, places no limitation on management's statutory right to discipline. Therefore, the above proposal is negotiable.

Article 19, Part C: "Grievance Procedure"

> 2.(2)(g) - The Chief of Police or his/her alternate, shall respond in writing to the class grievance within twenty-one (21) days of its receipt. ***Failure to reply as required within twenty-one (21) days shall constitute settlement of the grievance in favor of the grieving members.***

The Petitioner argues that the above proposal does not infringe on management's right to discipline employees under D.C. Code § 1-617.08(a)(2). It proposes procedures to be used when submitting a disciplinary action to grievance/arbitration review following the Respondent's exercise of its right to discipline an employee. Citing *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450 at pgs. 12-13, PERB Case No. 95-N-01 (1995).

The Respondent asserts that this proposal would cut off management's right to discipline if the Agency failed to respond within a twenty-one day time limit. The Respondent relies on D.C. Code

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[6]In a subsequent case concerning this same issue, the District of Columbia Court of Appeals affirmed the Board's ruling sustaining an arbitrator's finding that an untimely response was a bar to imposing discipline. *Metropolitan Police Department v. Public Employee Relations Board,* 05-CV-004642P MPA (June 13, 2006).

[7]See *Washington Teachers' Union and District of Columbia Public Schools*, Slip Op. No. 450 at pgs 8-9, supra, where the Board held that management's decision to exercise its sole right under D.C. Code § 1-61[7].08(a)(2) to transfer employees is not compromised when the proposal is limited to procedures that place no limitations on the right to transfer or to accommodation for employees transferred. Here, the proposal in Article 19, Part B, Section 3, to dismiss disciplinary action when management fails to adhere to the time limits in the appeal process, places no limitation on management's statutory right to discipline.

§ 1-617.08(a)(4), which provides that "[t]he Agency personnel authorities are solely entrusted with the statutory right '[t]o maintain the efficiency of the District government operations entrusted to them'." The Respondent cites no Board precedent in support of its position.

The Board finds that Article 19, Part C, § 2.(2)(g) is procedural in nature. Therefore, the proposal is negotiable for the same reasons cited in the discussion concerning "Article 19, Grievance Procedure, Part B, § 3", above.

Article 26: "Temporary Details and Acting Pay"

> *When a member's temporary detail ends, the Department shall return the member to the member's original assignment, if it still exists. If the member's original assignment no longer exists the member may choose an assignment that is currently open in any unit that the member is qualified to join. The Department will also assign the member the same days off the member had before being detailed, unless the member and the Department agree to change the member's days off.*

The Petitioner acknowledges management's right to assign employees but asserts that this proposal is not an infringement of management's right to assign because it leaves in the hands of management the ability to determine whether an employee is qualified for his or her preferred assignment. The Union cites no precedent in support of its position.

The Respondent argues that this proposal infringes on management's right to assign employees and direct the workforce.

The Board finds that Article 26 is nonnegotiable. Under D.C. Code § 1-617.08(a)(2), assigning employees is a statutory management right. Therefore, we believe that the above proposal impermissibly interferes with management's statutory right because it limits where the MPD may assign employees and gives employees the right to choose their assignment - instead of MPD. Also, we have found nonnegotiable a proposal requiring an employee's consent before his or her detail could be extended. See, *Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and District of Columbia Public Schools,* 38 D.C. Code 6693, Slip Op. No. 263 at p. 12, PERB Case Nos. 90-N-02, 90-N-03, 90-N-04 (1991); see also, *D.C. Public Schools and Teamsters, Local 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* AFL-CIO, 38 DCR 2483, Slip Op. No. 273 at p. 21, PERB Case No. 95-N-01 (1991). Consistent with our previous holdings, we find that this proposal is nonnegotiable because it infringes on management's right to assign employees under D.C. Code § 1-617.08(a)(2).

Article 30, § 2 and § 3: "Overtime/Compensatory Time"

Section 1 - For preplanned events that require the cancellation of days off, the Employer shall first seek volunteers on the basis of seniority from the units that are required to staff the event. If there are insufficient volunteers, the Employer shall assign employees to appropriately staff the event.

Section 2 - [delete: "To the extent that the Fair Labor Standards Act permits the Employer to substitute compensatory time for overtime payments, it is agreed that the Employer may make that substitution in the manner provided by the Act."] And add:
To the extent that the Employer's [delete: "present"] *policies, procedures and practices that were in effect prior to the Order, dated December 27, 1996, from the former District of Columbia Financial Responsibility and Management Assistance Authority were equal to or exceeded the requirement of the Fair Labor Standards Act, those policies, procedures, and practices shall* [delete: "remain in effect"] ***be restored to effectiveness,*** *except as otherwise provided herein.*

Section 3 - [delete: "For the purpose of determining entitlement to compensatory time and overtime pay, all hours of work performed outside the basic work week and the basic work day shall be deemed overtime hours.] And add: ***All hours of work which entitle the employee to overtime compensation will be paid in cash at a rate equal to one-and-a-half times the regular rate of pay.***

The Petitioner believes that these proposals are negotiable, arguing that the legislation referenced in Section 2 expired on September 30, 2001, because: (1) it was contained in an appropriations act, and (2) this type of legislation expires after one year. The Petitioner notes that the FY 2001 Appropriations Act and its impact on the current labor agreement is the subject of a pending arbitration between the parties. The Union cited no precedent in support of its position.

The Respondent asserts that these proposals are nonnegotiable because Congress intended that § 156 of the FY 2001 Appropriations Act - a provision containing an order by the Control Board limiting overtime as defined in the Federal Labor Standards Act ("FLSA") - extends beyond one year. Furthermore, the Respondent claims that Congress ratified the Control Board's Order to limit overtime in this manner and made it retroactive to December 1996. Management contends that the fact that the provision was made retroactive to 1996, indicates that Congress meant for this provision of the Act to extend beyond one year. The MPD cited no precedent in support of its position.

The Board finds Article 30, § 2 and § 3 to be negotiable. Section 156 of the FY 2001 Appropriations Act embodied the Control Board's Order of 1996. The Control Board's Order of 1996 limited the payment of overtime pursuant to FLSA regulations, retroactive to 1996. Congress ratified the Order and incorporated it in the FY 2001 Appropriations Act. Subsequently, in two arbitration review requests involving the same parties involved in this Negotiability Appeal, this Board ruled that the FY 2001 Appropriations Act expired on September 30, 2001. See *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 784 at pgs. 9-11, PERB Case No. 04-A-13 (March 31, 2005); see also *Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, Slip Op. No. 795 at p. 4, PERB Case No. 04-A-04 (July 21, 2005). Therefore, the FY 2001 Appropriations Act no longer has any bearing on how overtime is paid in the District. As a result, the requirement which limits the payment of overtime pursuant to FLSA regulations has been lifted, rendering negotiable Article 30, § 2 and § 3.

Article 39, § 1 and § 3: "Uniform and Clothing Allowance"

> Section 1 - *The clothing allowance for officers detailed to investigative duties in a Detective Unit, and all Investigators and Detectives shall be $2,000 per year. The clothing allowance for any employee authorized to wear casual clothes in any other unit shall be $750 per year. Payment shall be made twice yearly, no later than April 15 and October 15 each year. Members shall be authorized to receive prorated payments based on the length of time the member was assigned or detailed to a position in which the member was authorized to receive this payment. The Department recognizes this payment is not part of the member's salary, rather it is reimbursement for costs borne by the member on behalf of the Department due to the member's detailed or assigned position; therefore, such payments shall be made in accordance with applicable federal and District of Columbia tax laws."*
>
> Section 3 - *After the initial increase in the uniform and clothing allowance set forth in Section 1, the uniform and clothing allowance shall increase on the same date and by the same* percentage rate of the negotiated salary increase for the life of the contract.

The Petitioner argues that because previous contracts have exceeded the statutory limitations for uniform and clothing allowance, this proposal is negotiable.

The Respondent claims that this proposal is nonnegotiable because it exceeds the amounts

allotted by statute at D.C. Code § 5-111.03, "Appropriations".[8] The Respondent further argues that despite the fact that the parties previously reached agreement on a similar proposal, it has no duty to bargain concerning this proposal because management rights revert back to management when the old contract expires. Citing *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450, PERB Case No. 95-N-01 (1995).

The Board finds that this proposal is nonnegotiable because it exceeds the amounts allotted by statute at D.C. Code § 5-111.03, "Appropriations", which contains "*not exceeding*" and "*not to exceed*" language concerning the amounts set by law.[9]

IV. Issues to be briefed by the parties

Based on the information provided by the parties, the Board is unable to make a determination concerning the negotiability of the four (4) articles listed below. Therefore, the Board is directing that the parties brief these proposals. In their briefs, the parties should state their position and provide any legal authority (i.e., case law, Board precedent, etc.) in support of their position.

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[8]D.C. Code § 5-111.03 (a) - "Appropriations" provides that "a sum *not exceeding* $75 per annum for each member of the Metropolitan Police [Department] . . . " for "uniforms and all other official equipment prescribed by Department regulations as necessary and requisite in the performance of duty." Also, D.C. Code § 5-111.03 (b) authorizes the Chief of Police of the Metropolitan Police force "to provide a clothing allowance *not to exceed* $300 in any 1 year to an officer or member assigned to perform duties in 'plainclothes'."

[9]Furthermore, the Union's argument that this article is negotiable because the parties have previously negotiated this issue is without merit. In *Washington Teachers' Union and District of Columbia Public Schools,* 46 DCR 8090, Slip Op. No. 450 at page 9, PERB Case No. 95-N-01 (1995), the Board noted the following:

> Petitioner asserts that the parties' inclusion of . . . [a] provision in prior agreements has made the subject of the proposal a mandatory subject of bargaining as between the parties. *While an employer may bargain and reach agreement on matters over which it has no duty to bargain under the CMPA, the statutory right remains reserved to management once the contract has expired.* We have looked to the parties' current and prior agreements when it is a close question whether a matter is a required subject of bargaining. (Citations omitted) We find no close question in considering this proposal, and find it nonnegotiable. (emphasis added).

Similarly, here, we find no close question in considering the Union's proposal. Thus, Article 39, § 1 and § 3 is nonnegotiable.

1. Article 12, § 16 - *Discipline - Carrying guns*;
2. Article 16.2 § 3 - *Employee Records*;
3. Article 28 - *Polygraph Tests*; and
4. Article 38 - *Tech Pay, Special Duty and Skills Premium*

The positions of the parties regarding the above articles are set forth below:

Article 12, § 16: "Discipline"

> Section 16 - (Respondent contends the following proposal to strike language from this provision is non-negotiable):
> In all other circumstances, it shall be the Department's policy to permit an officer or sergeant to continue to carry [delete: "the authorized weapon for self protection, if he/she so requests, stating that he/she has good reason to fear injury to his/her person or property"] and add:
> **all authorized Departmental weapons.** Permission need not be granted if the Chief of Police or his/her agent reasonably determines, based upon the particular facts and circumstances of the case, that the permission should be denied for reasons of public safety or welfare. ***A decision to withhold such permission shall include a written explanation articulating the facts and circumstances upon which the Chief of Police relied in making that decision.***

FOP's Position: The Union argues that this issue is negotiable because all matters shall be deemed negotiable except those proscribed by the CMPA. Citing *Washington Teachers' Union and District of Columbia Public Schools*, 46 DCR 8090, Slip Op. No. 450 at p. 4, PERB Case No. 95-N-01 (1995). Furthermore, the Union claims that "by not objecting to the negotiability of the subject matter of this proposal, the Respondent implicitly concedes the negotiablity of this [proposal]". (Negotiability Appeal at p. 6).

MPD's Position: Management does not articulate an argument concerning Article 12, § 16.

Board: *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position.

Article 16.2 - "Employee Records"

> Subsection (3) - The Department shall, [delete: "at least once per year"] **by the end of each quarter of the fiscal year, review all Personnel Records and remove or obliterate such files or entries as required**.

FOP's Position: The Union contends that "the proposed language merely codifies the legally-imposed obligation to purge records containing 'immaterial, irrelevant, or untimely information [pursuant to D.C. Code § 1-631.05(c).]"[10] The Union further argues that D.C. Code § 1-631.05(b) confers on the employee "the right to . . . seek to have irrelevant, immaterial, or untimely information removed from the record."[11] Therefore, the Union concludes that "in proposing a time frame for the Respondent to conduct a review of personnel records for purposes of insuring compliance with the law, [it] is merely asserting . . . the statutory right to seek the removal of records containing immaterial, irrelevant, or untimely information." (Negotiability Appeal at pgs. 8-9). The Union cites no legal precedent.

MPD's Position: Management relies on D.C. Code § 1-631.05(*c*) which contains a three-year review and purge of documents in an employee's official record. Management maintains that the Union's proposal conflicts with this provision. Management cites no legal precedent.

Board: *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).

Article 28 - "Polygraph/Deception Detection Examinations"

> *Refusal to take a polygraph examination or to cooperate in any other examination utilizing devices designed to detect deception will not be a basis for disciplinary action.*

FOP's Position: The Union contends that this proposal is not contrary to law (D.C. Code § 32-902) because the law authorizes polygraph testing, but does not *require* polygraph testing. Therefore, the Union believes that the proposal "does not stand in conflict with this provision of the law." (Negotiability Appeal at p. 11) The Union further argues that the proposal is negotiable because the parties negotiated similar language in the current collective bargaining agreement, citing *Washington Teachers' Union and District of Columbia Public Schools*, Slip. Op. No. 450.

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[10]D.C. Code § 1-631.05(c) provides as follows: "For the purpose of this subchapter, information other than a record of official personnel action is untimely if it concerns an event more than 3 years in the past upon which an action adverse to an employee may be based. Immaterial, irrelevant, or untimely information shall be removed from the official record upon the finding by the agency head that the information is of such a nature. Prior to the removal of any information in the file, the employer shall notify the employee and give him or her an opportunity to be heard."

[11]D.C. Code § 1-631.05(b) provides as follows: "Each employee shall have the right to present information immediately germane to any information contained in his or her official personnel record and seek to have irrelevant, immaterial, or untimely information removed from the record."

MPD's Position: Management asserts that D.C. Code § 32-902 creates a management right to administer lie detector tests, therefore this proposal is non-negotiable. Furthermore, MPD claims that the proposal violates management's right to discipline employees for refusal to obey a lawful directive.

D.C. Code § 32-902 provides as follows:

> (a) No employer or prospective employer shall administer, accept or use the results of any lie detector test in connection with the employment, application or consideration of an individual, or have administered, inside the District of Columbia, any lie detector test to any employee, or, in or during any hiring procedure, to any person whose employment, as contemplated at the time of administration of the test, would take place in whole or in part in the District of Columbia.
>
> (b) The provisions of this section shall not apply to any criminal or internal disciplinary investigation, or pre-employment investigation conducted by the Metropolitan police, the Fire Department, and the Department of Corrections, provided that any information received from a lie detector test which renders an applicant ineligible for employment shall be verified through other information and no person may be denied employment based solely on the results of a pre-employment lie detector test.

Board: *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).

Article 38 - "Tech Pay Special Duty and Skill Premiums"

> *Effective the first pay period on or after October 1, 2003, Tech Pay will be an amount equal to 7.5% of the first step of an Officer's pay. Special duty and still amount equal to 7.5% of the first step of an Officer's pay. Special duty and skill premium pay shall be equal to 10% of the first step of an Officer's pay.*

FOP's Position: The Union contends that the D.C. Code does not specifically set a limit on employer contribution for technicians and special skills pay. Therefore, the Union argues that the proposal is negotiable.

MPD's Position: Management asserts that the Union's proposal exceeds the stipends set in law for special duty and skill premiums, citing D.C. Code § 5-542.02 and § 5-543.02.[12] Therefore, Management argues that the proposal is nonnegotiable because it is contrary to law.

Board: *The parties shall brief the above issue.* Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position. Specifically, the parties should:

> (a) Explain the difference between "*Tech pay*", "*Special duty*" and "*Skills premiums*".
>
> (b) Give the definition for "tech position";
>
> (c) State what job classifications are addressed in this proposal; and
>
> (d) Cite the specific language in the D.C. Code which supports their position (in connection with *each position* that is at issue in the proposal).

V. Submission of information to the Board

The Board is unable to make a determination concerning Article 27 - "Performance Evaluation" without receiving further information from the parties. Therefore, the Board is directing that the parties provide a copy of General Order 201.20.

Article 27 - "Performance Evaluation"

> The existing General Order 201.20, Performance Rating Plan, shall remain in effect unless the Department provides the Union with notice of any proposed changes(s). **The Department and the Union shall negotiate any changes affecting matters covered in General Order 201.20, in accordance with Part I, A., 2, of same.**

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[12]D.C. Code § 5-542.02 provides in addition to the scheduled rate of pay that "*members of the Metropolitan Police Force . . . appointed . . .(1) to perform the duty of a helicopter pilot; or (2) to render explosive devices ineffective or to otherwise dispose of such devices shall receive . . .$2,270 per annum. . . . [and] each officer or member . . . assigned . . . as scuba divers shall receive . . . $2,710 per annum so long as he or she remains in such assignment.*" Furthermore, D.C. Code § 5-543.02 provides a $810 per annum supplement to basic compensation for "*technician's positions*" and a $595 per annum supplement to basic compensation for "*detective sergeant[s] in subclass (b)*".

FOP's Position: The Union argues that the above proposal is meant to engage management in impact bargaining and is negotiable.

MPD's Position: The Respondent asserts that this proposal is nonnegotiable relying on D.C. Code § 1-613.53(b) which states as follows: "Notwithstanding any other provision of law or of any collective bargaining agreement, the implementation of the performance management system established [in subsection (a) of that section] is a nonnegotiable subject for collective bargaining."

Board: Concerning Article 27 - Performance Evaluation, the parties shall submit a copy of General Oder 201.20, "Performance Rating Plan".

ORDER

IT IS HEREBY ORDERED THAT:

1. The following proposals are **negotiable**:

    a. Article 11 - Use of Department Facilities;

    b. Article 12, § 9 - Discipline; Time limits;

    c. Article 19, Part B, § 3 - Grievance Procedures;

    d. Article 19, Part C, § 2(2)(g) - Grievance Procedures; and

    e. Article 30, § 2 and § 3 - Overtime.

2. The following Articles are **nonnegotiable**:

    a. Article 12, § 2 - Discipline; Assignment of investigator and disciplinarians;

    b. Article 12, § 11 - Discipline; Implement discipline only afer going to arbitrator or OEA;

    c. Article 12, § 14 - Discipline; More than 10 hours to prepare a defense;

    d. Article 14, § 1 - Transfers;

    e. Article 14, § 3 - Transfers;

    f. Article 26 - Temporary Details; and

g. Article 39, § 1 and § 3 - Uniform Allowance.

3. The parties shall **brief** the articles listed below. *Specifically, the parties should state their position and state any law, rule, regulation, Board precedent or any other authority in support of their position.* **The parties' briefs are due within fifteen (15) days of the date of this Order**:

a. Article 12, § 16 - Discipline; Carrying guns

b. Article 16.2, § 3 - Employee Records - *also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).*

c. Article 28 - Polygraph Tests - *also, state the issue that the statute addresses (or does not address) as well as the issue that the proposal addresses (or does not address).*

d. Article 38 - Skills Premium (Technician Pay) - also;

(1) Explain the difference between *"Tech pay"*, *"Special duty"* and *"Skills premiums"*.

(2) Give the definition for "tech position";

(3) State what job classification are addressed in this proposal; and

(4) Cite the specific language in the D.C. Code which supports their position (in connection with *each position* that is at issue in the proposal).

4. The parties shall **provide** the Board with a copy of General Order 201.20 concerning Article 27 - Performance Evaluation. **The parties' submission is due within fifteen (15) days of the date of this Order**.

5. Pursuant to Board Rule 532.4 and Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 11, 2006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Department of Corrections,	
Petitioner,	
and	PERB Case No. 05-A-08
	Opinion No. 851
Fraternal Order of Police, Department of Corrections Labor Committee (on behalf of Michelle Ettienne),	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Department of Corrections ("DOC" or "Agency") filed an Arbitration Review Request ("Request") appealing an arbitration award ("Award") which rescinded the termination of Michelle Ettienne ("Grievant"). The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Union") opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy." D.C. Code § 1 - 605.02(6) (2001 ed.).

II. Discussion:

The facts of the case as found by the Arbitrator are as follows: The Grievant held the position of Correctional Officer, Grade DS-8, with the rank of Corporal. At the time of the Grievant's discharge, her assignment was at Community Correctional Facility No. 4 ("CCC"), a half-way house, located in Washington, D.C. On May 31, 2001, the Grievant was working the 3:00 p.m. to midnight shift at Housing Unit One of the CCC. At about 8:50 p.m., Corporal Jesse Shelton was processing an inmate at the "shake-down" desk at the entrance to the facility. During the processing the inmate became agitated after being asked to provide a urine sample. The inmate also loudly indicated that he had not received his check for outside detail work. Corporal Shelton tried to calm the inmate, and asked Sergeant Lamont Wilson for a pair of handcuffs "in an effort to get the inmate's attention." (Award at p. 4). The Grievant, who had knowledge of the inmates failure to be paid for several months, went to the shake down area and urged that the inmate calm down. (See Award at p. 4).

Corporal Shelton asked the Grievant to let him deal with the inmate. Sergeant Wilson then instructed the Grievant to return to her post. Instead, the Grievant "got up on the control center desk in a kneeling position.... [and] declared 'If you want to cuff somebody, cuff me.'" (Award at p. 5). Sergeant Wilson told the Grievant to get off the desk and return to her post. The Grievant complied. "However, as she passed Shelton, [she] stopped and called him 'a demon', and said he couldn't tell her what to do." (Award at p. 5). In addition, the Grievant told the inmate that he should call the Washington Post concerning the situation with his pay check and that she would support his story in writing. (See Award at p. 5).

"Shelton advised the Grievant she should not encourage [the inmate] to contact the newspaper; that this was inappropriate." (Award at p. 5). After the Grievant returned to her post, Corporal Shelton contacted the Assistant Administrator at CCC and informed her of the incident. He was then instructed to contact the Administrator. The chain of command was followed to Captain Minus and Acting Warden Brown. Corporal Shelton also completed a written report regarding the incident. (See Award at p. 5). Sergeant Wilson also contacted Capt. Minus about the incident, which was relayed to Warden Brown, who instructed Capt. Minus to go to CCC and place the Grievant on administrative leave. At approximately 11:40 p.m., Capt. Minus arrived at CCC and telephoned the Grievant; instructing her to report to his office, and that the Grievant could report with a representative. By 11:45 p.m. the Grievant had not reported to Capt. Minus' office. Therefore, at approximately 11:50 p.m., Capt. Minus telephoned Sergeant Wilson and told him to have the Grievant relieved from her post and have her report to his office. Sergeant Wilson carried out those instructions. However, when the relieving officer arrived at the Grievant's post, the Grievant did not depart for Capt. Minus' office, but remained at her post indicating that she had not determined who should act as her representative. The conflict for the Grievant concerned the fact the Union Steward was Corporal Shelton. (See Award at pgs. 6-7).

At approximately 11:53 p.m., Capt. Minus decided to go to Unit One and meet with the Grievant. Upon arrival, Capt. Minus directed the Grievant to report to his office before the end of her shift, with or without her representative. The Grievant asked Capt. Minus to repeat his order three times. She then informed Capt. Minus that "he would have to deal with her through the Union President." (Award at p. 7). At that point, Capt. Minus stated he was immediately placing the Grievant on administrative leave. "The Grievant abruptly got up from her chair, ran into the lobby area with her hands over her ears, loudly declaring: 'I don't hear a word you are saying.'" (Award at p. 7). No more communication occurred between the Grievant and Capt. Minus and the Grievant left the facility at approximately 12:12 a.m. (See Award at p. 7).

DOC conducted an investigation. On June 19, 2001, Warden Brown informed the Grievant by letter that she was summarily removed from her position. In a July 20, 2001 letter to the Grievant, Warden Brown wrote in part:

> Pursuant to ... (DPM)[2] Section 1617.3, this is written notice that effective Tuesday, June 19, 2001, you were summarily removed from your position... based upon a determination that your conduct:
>
> a. Threatened the integrity of government operations;
> b. Constitutes an immediate hazard to the agency, to other District employees, or to the employee;
> c. Is detrimental to public safety.
>
> The summary removal action is based on the following cause(s):
>
> a. Malfeasance: an on-duty act that interferes with the integrity of government operations; and
> b. Insubordination: refusal or failure to comply with written instruction or direct orders by a superior.

The letter set forth specifications supporting these charges. They also cited the following:

BASIC REGULATIONS FOR ALL EMPLOYEES

1.3 Authority and Chain-of-Command: Employees must regard

[2] "DPM" refers to the District Personnel Manual.

> themselves as directly responsible to their immediate supervisor. Obedience to all orders must be followed with promptness and efficiency.
>
> THE CORRECTIONAL OFFICERS' GENERAL ORDERS
>
> 2. Obey all orders of my superiors. . .
>
> . . .
>
> 10. Be courteous toward all supervisors, fellow employees, residents and members of the public, act in a gentlemanly manner or lady-like manner at all times, and commit no act which will discredit me, the Department of Corrections, or the Government of the District of Columbia.
>
> . . .
>
> 12. Leave my Post only when properly relieved, or when emergency conditions require me to do so.

(Award at pp. 8-9).

The letter also informed the Grievant that she was entitled to an administrative review by a Hearing Officer. The Grievant exercised this right, and in a report dated August 9, 2001, the Hearing Officer concurred with the action to summarily remove the Grievant from her position. On October 19, 2001, the Director of DOC informed the Grievant of a final decision, stating in part:

> I have carefully reviewed the evidence of record, which consists of all documents giving rise to issuance of the written notice, the Hearing Officer's report and your written response. Consequently, I have decided to uphold the action proposed against you. The evidence adduced makes it abundantly clear that your unpredictable and erratic behavior jeopardized the safety and security of the staff, inmates and the community at large. Your continued presence would adversely compromise the security, operations, and integrity of the Department. Accordingly, the summary removal effected on June 19, 2001, is sustained.

(Award at p. 9).

The Union filed a grievance, which was denied. As a result, the Union invoked arbitration on behalf of the Grievant. The Arbitrator identified the issue before him to be: "Was the Grievant... discharged for cause in accordance with Chapter 16 of the [DPM]; if not, what should the remedy

be?" (Award at p. 1).[3]

At arbitration, DOC presented testimony and evidence of the Grievant's actions on May 31, 2001. DOC argued that the discharge of the Grievant was proper due to her disruptive behavior. (See Employer's Post Hearing Brief ("DOC Brief") at p. 8). In addition, DOC contended that discharge was appropriate because of the Grievant's defiant behavior to Capt. Minus, in violation of DOC Basic Regulation 1.3, regarding the Chain-of-Command. (See DOC Brief at p. 11). Also, DOC argued that progressive discipline was not required by Chapter 16 of DPM. (See DOC Brief at p. 14).

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[3]Chapter 16 of the DPM provides, in pertinent part, as follows:

1603 DEFINITION OF CAUSE: GENERAL DISCIPLINE

1603.2 Except where a less restrictive standard is provided by statute or other provision of law, a corrective or adverse action, including ... removal, may be taken only for cause...

1603.3 For the purpose of this chapter, "cause" means ... any on-duty ... act that interferes with the efficiency or integrity of government operations; and any other on-duty ... reason for corrective action that is not arbitrary or capricious. This definition includes... insubordination, misfeasance, malfeasance. . .

1603.5 No employee may be subject to a corrective or adverse action under this chapter for a *de minimus* violation of the cause standard contained in this section.

1603.8 Removal is not mandated under any provision of this section. Unless otherwise mandated by law, previous standards or doctrines for selection of a corrective or adverse action for cause are hereby repealed. . .

1603.9 Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate.

1603.10 In any disciplinary action, the government shall bear the burden of proving by a preponderance of the evidence that the corrective or adverse action may be taken or, in the case of summary action, was taken, for cause as that term is defined in this section. . .

1617 SUMMARY REMOVAL: GENERAL DISCIPLINE

1617.1 An agency head may remove an employee summarily when the employees conduct:

(a) Threatens the integrity of government operations;

(b) Constitutes an immediate hazard to the agency...

(c) Is detrimental to public health, safety, or welfare.

The Union countered that the Grievant's actions did not rise to the level of malfeasance or insubordination. (See Union Post-hearing Brief ("Union Brief") at pg. 6). The Union further argued that the Grievant's actions should be considered a *de minimus* violation and, therefore, DOC did not have cause to terminate the Grievant. (See Union Brief at p. 8). In addition, the Union contended that the summary termination of the Grievant was excessive and out of proportion to the character of the offenses for which she was charged. (See Union Brief at p. 9). In support of their argument the Union cited *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), identifying 12 factors which are relevant when determining the appropriateness of the penalty. Utilizing the *Douglas* factors, the Union provided several mitigating factors which it believed should have been taken into account by DOC. (See Union Brief at p. 10-12).

In an Award dated March 8, 2005, Arbitrator James M. Harkless found that while DOC had proven that the Grievant's actions on May 31, 2001, were "wrong", "unprofessional", and "discourteous", "[the evidence] falls short of proving that her summary removal for this misconduct was for cause; that it threatened the integrity of government operations, was an immediate hazard to the Department, other employees or to the Grievant, or was detrimental to public safety." (Award at pgs. 10-12). In addition, the Arbitrator noted that there was no further disturbance from the inmates and found that DOC had failed to establish that the Grievant's misconduct "jeopardized the safety and security of the staff, inmates and the community at large, as the DOC Director determined." (Award at p. 12). The Arbitrator stated, that while the Grievant's conduct was improper, it "was not so egregious that it warrant[ed] discharge..." (Award at p. 15). The Arbitrator added, "in determining to remove the Grievant, DOC did not appear to consider her prior employment history. Both [DOC] and Union witnesses praised the Grievant's performance as a Correctional Officer, and her performance evaluations prior to her removal supported that praise." (Award at p. 15).

As a remedy the Arbitrator stated the following:

> For the reasons given, the Grievant's discharge was not for cause. The Grievant shall be reinstated as an employee, and the discharge is reduced to a thirty day suspension without pay, effective July 19, 2001. The Grievant shall be entitled to all lost pay, benefits, and seniority resulting from cancellation of her discharge. (Award at p. 15)

In their Arbitration Review Request ("Request"), DOC asserts that "[t]he evidence presented at the arbitration hearing clearly supports the Agency's decision to summarily remove the Grievant from her position as a correctional officer." (Request at p. 5). Based upon this contention, DOC argues that the Award is contrary to law and public policy. In addition, DOC asserts that the "proposed remedy is impermissible under the [DPM] and the parties' [CBA] and is unnecessarily punitive." (Award at p. 6).

FOP counters that DOC's "disagreement with the remedy of reinstatement does not present a statutory basis for review, and therefore, should be denied." (Opposition at p. 5).

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without, or exceeded, his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

In the present case, DOC's first basis for review is that the Award is contrary to law and public policy. DOC argues that the proposed remedy is impermissible under the DPM and the parties' CBA and is unnecessarily punitive. (See Request at p. 5). In support of this argument, DOC contends that it submitted sufficient evidence to support its decision to terminate the Grievant. (See Request at p. 6). DOC requests that the Board review this evidence and find that the Arbitrator's decision is "impermissible under the DPM, clearly erroneous, irrational, [and] cannot be supported by the record evidence and is contrary to law and public policy and must be vacated." (Request at p. 6).

FOP counters that DOC has failed to present a statutory basis for review. We agree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of Public Policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). We have also held that to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). In addition, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987); see also, *Washington -Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F. 2d 1234, 1239 (D.C. Cir. 1971).[4] Moreover, the petitioning party has the burden to specify applicable law and definite public

[4] See, *Metropolitan Police Department and Fraternal Order of Police/Metroploitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *American Federation of Government Employees, Loval 631 and Department of Public Works*, 45 DCR 6617, Slip Op. No.

policy that mandates that the Arbitrator reach a different result. *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000); See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). Furthermore, as the District of Columbia Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Local No. 246*, 554 A.2d 319, 325 (D.C. 1989).

In the present case, DOC asserts that the Arbitrator's Award is contrary to law and public policy. However, DOC does not cite any specific provision of the DPM, law or public policy which mandates that the Arbitrator arrive at a different result. Instead, DOC requests that the Board review the evidence it submitted at the arbitration hearing and find the Award was "impermissible under the DPM, clearly erroneous, irrational, [and] cannot be supported by the record evidence and is contrary to law and public policy. . ." (See Request at p. 6). In light of the above, we believe that DOC's argument merely represents a disagreement with the Arbitrator's findings and conclusions. We have held that a disagreement with the Arbitrator's findings is not a sufficient basis for concluding that an arbitration award is contrary to law and public policy. See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 31 DCR 4159, Slip Op. No. 85, PERB Case No. 84-A-05 (1984). Therefore, DOC's claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground.

In its second argument DOC asserts that the Arbitrator's remedy is impermissible under the DPM and the CBA, and is unnecessarily punitive. (See Request at p. 6). In support of these assertions, DOC raises two issues. First, DOC argues that the Grievant was, prior to her summary removal, part of a group of employees who were subjected to a Reduction-in-Force ("RIF"), and consequently she cannot be returned to work. Second, DOC indicates that it believes that the Award would allow for back pay with no offset for interim earnings, which is impermissible under the DPM.

FOP counters that the DOC's assertion that the Grievant "would have been RIF'd is pure speculation based on the assumption that she would have received a RIF notice had she not been summarily terminated." (Opposition at p. 6). In addition, FOP asserts that the issue of the RIF was never presented to the Arbitrator. (See Opposition at p. 6). FOP argues that "[i]ssues not presented to the Arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." (Opposition at p. 6 citing *District of Columbia Police/Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip

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365 at p. 4 n. 4, PERB Case No. 93-A-03 (1998); See, *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p.6, PERB Case No. 86-A-05 (1987).

Op. No. 282 at p. 4 n. 5, PERB Case No. 87-A-04 (1992)). Also, FOP contends that DOC's request would require the Board "to substitute its judgment on remedy for that of the Arbitrator. (Opposition at p. 7). Therefore, FOP contends that DOC has not presented a statutory basis for review.[5] For the reasons described below, we agree.

After reviewing the Award, the Board has found no evidence to support DOC's assertion that that these two issues were raised during the Arbitration hearing. As a result, we conclude that DOC has raised these issues for the first time in its Request. This Board has held that "[i]ssues not presented to the arbitrator cannot subsequently be raised before the Board as a basis for vacating an award." *Id.* Moreover, a Petitioner cannot base an arbitration review request on issues not first presented to an arbitrator. See *District of Columbia Fire and Emergency Services and AFGE, Local 3721*, _DCR_, Slip Op. No. 756, PERB Case No. 02-A-08 (2004). In light of the above, DOC's assertions, being raised for the first time on appeal to this Board, cannot be considered a basis for review.

Lastly, DOC argues that the Award provides for the payment of back pay without deductions for interim earnings, and is, therefore, impermissible under the DPM. We note that, in its Opposition to DOC's Request, FOP asserts that through counsel, it has informed the Office of Labor Relations and Collective Bargaining that it does not object to having the interim earnings, if any, deducted from the Grievant's back pay Award. (See Opposition at p. 2). Therefore, we find that DOC's argument regarding interim earnings is moot.

In view of the above, we find that there is no merit to DOC's arguments. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, or contrary to law or public policy. Therefore, no statutory basis exists for setting aside the Award.

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[5]FOP did not present any argument countering the DOC's assertion that the Award would provide for back pay without deductions for interim earnings.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Department of Correction's Arbitration Review Request is denied.

(2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 28, 2006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Public Schools Division of Transportation,	
Petitioner,	
and	PERB Case No. 06-A-14
	Opinion No. 852
Teamsters Local Union No. 639, a/w International Brotherhood of Teamsters (on behalf of Karen Wise),	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Public Schools' Division of Transportation ("DCPS"or "Agency") filed an Arbitration Review Request ("Request") that seeks review of an arbitration award ("Award") which sustained in part and denied in part the grievance filed by the Teamsters Local Union No. 639, a/w International Brotherhood of Teamsters ("Union") on behalf of Karen Wise ("Grievant"). The Union opposes the Request ("Opposition").

The issue before the Board is whether "the arbitrator was without authority or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code § 1 - 605.02(6) (2001 ed.).

II. Discussion:

The Grievant was employed by DCPS as a Motor Vehicle Operator ("MVO") assigned to the New York Avenue Terminal ("Terminal"). (See Award at p. 5). On July 11, 2005, prior to leaving the Terminal on her route, the Grievant, in her capacity as union steward, was asked by MVO Harrison, if she could be present while Harrison discussed a work related matter with the Director of Operations, Mr. Pettigrew. Following the discussion, the Grievant asked Mr. Pettigrew if she could have time off between her morning and afternoon shifts to deliver some documents to DCPS, and for a ride to and from DCPS. Mr. Pettigrew denied the request and a disagreement and altercation ensued between Mr. Pettigrew and the Grievant. (See Award at p. 7). That same morning Mr. Pettigrew reported the incident to the Transportation Administrator, and the Administrator determined that there was just cause to terminate the Grievant based on Mr. Pettigrew's report. (See Award at p. 12). Later that day, both parties filed police reports alleging their versions of the altercation, suggesting both verbal and physical assaults from one another. (See Award at pgs. 7-11).

"On July 11, the Union submitted a grievance protesting Mr. Pettigrew's alleged physical assault of the Grievant as well as harassment and discrimination." (Award at p. 13). On July 12, 2005, the Grievant reported to work. Before commencing her route, the Grievant was informed by Terminal management that she was not supposed to be at the Terminal because she had "been recommended for termination (or that she had been terminated), although they did not have copies of the paperwork." (Award at p. 11). Initially, the Grievant refused to leave and telephoned District of Cloumbia police officers. As a result, the Grievant was escorted from the premises. Later that day, a written notice of termination was issued, which was effective August 2, 2005, (See Jt. Ex. 2). The termination notice charged the Grievant with assault, threatening a superior and insubordination. The notice of termination described the two incidents of July 11 and July 12, 2005. (See Award at p. 12).

Also, on July 12, 2005, the Union submitted a grievance on behalf of the Grievant protesting Management's use of improper termination procedures. (See Award at p. 13). On August 1, 2005, the Union submitted an additional grievance protesting the Grievant's unjustified termination. (See Award at p. 13). The parties were unable to resolve the grievance. Therefore the Union invoked arbitration. (See Award at p. 13).

The issue submitted to the Arbitrator was:

> Did the Employer violate the Agreement when it discharged the Grievant from employment? If not, what shall be the remedy?

(Award at p. 2).

At Arbitration, DCPS argued "that it had proved just cause to terminate [the] Grievant for assault, threatening a superior and insubordination." (Award at p. 14). In addition, DCPS claimed

that "pursuant to Article XVII [of the parties' collective bargaining agreement ("CBA")], it [had] the authority to terminate an employee upon a first offense where the employee's actions 'may be detrimental to the efficiency and discipline of the school system.' It point[ed] out that the Agreement does not contain a table of penalties and maintain[ed] that the Agreement leaves to its discretion the grounds for discipline and discharge, so long as there is just cause." (Award at p. 14).[1] DCPS contended that it had conducted a full investigation of the incident. Furthermore, DCPS asserted that it had no duty to interview the Grievant because Article XVII, Section D, allows a grievant five days to respond to the notice of termination and the Grievant in the present matter filed no such response. (See Award at p. 15). Finally, DCPS argued that it would be contrary to law and public policy for the Arbitrator to set aside the penalty. (See Award at pgs. 15-16).

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[1] Article XVII (Discipline and Discharge) of the parties' CBA provides, in pertinent part, as follows:

A. Except for Actions which may result in damage to school property, or may be detrimental to the efficiency and discipline of the school system, or may be injurious to other individuals, disciplinary measures shall be taken in the following order:

Oral reprimand
Written reprimand
Suspension (notice to be given in writing)
Discharge

An employee may be suspended immediately if the employee's behavior or condition constitutes a danger to the employee, other staff, students or the operation.

B. Any disciplinary action or measure imposed upon an employee must be received by the employee, if hand delivered or post marked (if mailed) within fifteen (15) workdays of knowledge of the matter upon which the proposed action is based.

. . .

D. For suspension actions of five (5) workdays or more, or discharge, an employee shall be notified in writing with a copy to the Union no later than fifteen (15) workdays prior to the effective date. The notice shall include the intended action, with reasons for the action so stated. From within five (5) workdays of the receipt of the notice, the employee has the right to reply in writing, or in person, to all changes and to furnish any statements in support of his reply. The decision shall go into effect as stated unless, upon consideration by the responsible official of all relevant facts, the action is modified, at which time the employee and the Union shall be so notified, in writing, of the modification.

E. The Board shall not discharge any employee without just cause.

. . .

G. Any employee found to be unjustly suspended or discharged shall be reinstated with full compensation for all lost time and with full restoration of all other rights and conditions of employment.

The Union countered that Mr. Pettigrew instigated the dispute with the Grievant. In addition, the Union claimed that DCPS failed to conduct a proper investigation, and ignored credible evidence. Also, the Union contended that DCPS denied the Grievant due process, and consequently did not satisfy its burden to establish just cause. (See Award at p. 16).

In an Award issued on April 11, 2006, Arbitrator David Vaughn found that Article XVII of the CBA provides DCPS with the authority to terminate an employee whose actions "may be detrimental to the efficiency and discipline of the school system. However, the Arbitrator also concluded that summary discharge of an employee without due process, including the right of an employee to be heard prior to a decision being made, as well as consideration of all relevant circumstances prior to discharge, is contrary to the CBA's 'just cause' provision." (Award at p. 20)

Consequently, the Arbitrator found that DCPS failed to: (1) provide the Grievant with an opportunity to present her side of the story prior to the determination to discipline her; and (2) take into account all relevant circumstances prior to making the disciplinary determination. (See Award at p. 21). In addition, the Arbitrator determined that DCPS proved just cause to discipline the Grievant for her conduct in her confrontation with Mr. Pettigrew, however, it failed to prove that she assaulted Mr. Pettigrew. (See Award at p. 24). Also, the Arbitrator concluded that while DCPS proved the Grievant's conduct to be insubordinate, the circumstances served to mitigate her conduct. (See Award at p. 25). The Arbitrator also took into consideration the lack of any prior discipline against the Grievant. (See Award at p. 25). In light of the above, the Arbitrator decided that the proven conduct did not support the penalty of termination. (See Award at p. 25).

As a remedy, the Arbitrator directed that:

> [The] Grievant's termination shall be rescinded and the penalty for her misconduct reduced to a thirty-day unpaid disciplinary suspension. She shall be reinstated to service, with seniority unimpaired, and made whole for wages and benefits lost as a result of [DCPS's] action, less the period of her disciplinary suspension and less interim earnings. [The] Grievant's records shall be amended to so reflect. (Award at pgs. 25-26).

In their Request, DCPS argues that "[t]he Arbitrator erred by substituting his own judgment for that of the Federal Court-appointed Transportation Administrator with respect to the severity of the discipline issued." (Request at p. 8). In addition, DCPS asserts that the "Arbitrator was without authority and exceeded his jurisdiction under the controlling Agreement between [DCPS] and the Union to the extent that the Opinion and Award conflicts with the express terms of the Agreement and imposes additional obligations not expressly provided for in the Agreement." (Request at p. 10). Lastly, DCPS claims that "[t]he Opinion and Award is contrary to law and public policy to the extent

that Arbitrator Vaughn found that DCPS failed to consider 'all relevant circumstances.'" (Request at p. 13).

The Union counters that DCPS has not presented any statutory basis for review. (Opposition at p. 7).

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without authority, or exceeded, his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

In the present case, DCPS asserts that the Arbitrator was without authority or exceeded his jurisdiction by finding that there was cause for discipline, but reducing the penalty from termination to suspension.[2] (See Request at p. 8). In support of this argument, DCPS asserts that the Arbitrator should not have substituted his judgment for that of the Transportation Administrator. In addition, DCPS claims that the Arbitrator should not have imposed the additional requirement of conducting a proper investigation.[3]

The Union counters that the Board has consistently held that, absent language limiting the arbitrator's equitable power, an arbitrator does not exceed his authority by reducing a penalty. (See Opposition at pgs. 4-7). In addition, the Union asserts that there is no language in the parties' CBA limiting the Arbitrator's remedial authority. (See Opposition at p. 7). Furthermore, the Union claims

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[2]DCPS cites *Visteon Climate Control*, 120 Lab. Arb. (BNA) 1161 (Fullmer 2004) and *Franz Food Products*, 28 Lab. Arb. (BNA) 543 (Bothwell 1957), in support of this contention.

[3]In support of this argument, DCPS cites District of Columbia Water and Sewer Authority, *49 DCR 11123, Slip Op. No. 687 at p. 6, PERB Case No 02-A-02* (2002), quoting *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, which provides:

> An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).

that the Arbitrator was within his authority to "recognize that the concept of just cause necessarily requires an Employer to undertake a complete and [thorough] investigation of the underlying allegations against the Grievant." (Opposition at p. 7). Based on the foregoing, the Union asserts that DCPS has not presented a statutory basis for review. We agree.

This Board has held that:

> [by] submitting a matter to arbitration the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.

District of Columbia Metropolitan Police Department and Fraternal Order of Police/ Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police/Metropolitan Police Department Labor Committee (On behalf of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

In addition, we have found that an arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Moreover, we have held that an arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' [CBA].[4] See, *District of Columbia Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92–A-04 (1992). Furthermore, the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960), that "part of what the parties bargain for when they include an arbitration provision in a labor agreement is the 'informed judgment' that the arbitrator can bring to bear on a grievance, especially as to the formulation of remedies." See also, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008, at p. 6 (May 13, 2005).

In the present case, DCPS does not cite any provision of the parties' CBA that limits the Arbitrator's equitable powers. Furthermore, we have held that "an arbitrator does not exceed his authority by exercising his equitable powers (unless it is expressly restricted by the parties' contract) to decide what, if any mitigating factors warrant a lesser discipline than that imposed." *Washington Teachers' Union Local 6, AFT, AFL-CIO (On behalf of James Ricks) and District of Columbia*

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[4] We note that if the parties' CBA limits the arbitrator's equitable power, that limitation would be enforced.

Public Schools, 47 DCR 764, Slip Op. No. 448 at p. 4, PERB Case No. 95-A-09 and 95-A-10 (2000). Therefore, once Arbitrator Vaughn determined: (1) that DCPS had the authority to discipline the Grievant; and (2) "that summary discharge of [the Grievant] without due process . . . [was] contrary to the CBA'a 'just cause provision'," he had the authority to determine what he deemed to be the appropriate remedy. (Award at p. 20). Moreover the Arbitrator was not restricted from fashioning a remedy that reduced the penalty imposed upon the Grievant. Thus, we find that DCPS' assertion that the Arbitrator was without authority and exceeded his jurisdiction by rescinding the termination and reinstating the Grievant with a suspension involves only a disagreement with the Arbitrator's remedy. This does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

In addition, the Arbitrator found that under Article XVII(D), DCPS was required to consider all relevant facts. Specifically, Arbitrator Vaughn found that the language in Article XVII, "all relevant facts", requires DCPS to conduct a more thorough investigation. (See Award at pgs. 20-21). Although not stated, DCPS suggests that the Arbitrator's finding that DCPS failed to conduct an adequate investigation placed an additional requirement on DCPS that is not found in the parties' CBA. Moreover, DCPS contends that all that is required under Article XVII(D) of the CBA is that it provide the Grievant with an opportunity to respond to the notice of termination. (See Request at pp. 11-12).

We have held that by agreeing to submit the settlement of a grievance to arbitration, it is the Arbitrator's interpretation, not the Board's, that the parties have bargained for. See, *University of the District of Columbia and University of the District of Columbia Faculty Association*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement . . . as well as his evidentiary findings and conclusions . . ." *Id.* Moreover, "[this] Board will not substitute its own interpretation or that of the Agency for that of the duly designated arbitrator." *District of Columbia Department of Corrections and International Brotherhood of Teamsters, Local Union 246*, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). In the present case, the parties submitted their dispute to an Arbitrator and DCPS' disagreement with the Arbitrator's interpretation of the language in Article XVII of the parties' CBA is not grounds for reversing the Arbitrator's Award. See, *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. No. 04 MPA 0008 (May 13, 2005) and *Metropolitan Police Department v. Public Employee Relations Board*, D.C. Sup. Ct. 01 MPA 18 (September 17, 2002).

As a third basis for review, DCPS claims that the Award is contrary to law and public policy to the extent that Arbitrator Vaughn found that DCPS failed to consider "all relevant circumstances." In support of this argument, DCPS contends that "there was no evidence to suggest that the Transportation Administrator dismissed or failed to consider any relevant circumstances in deciding to terminate [the Grievant]." (Request at p. 13). In addition, DCPS argues that there was no

testimony or evidence that the Transportation Administrator was unaware of any of the circumstances, and that the Arbitrator merely disagreed with the weight he afforded those circumstances. (See Request at p. 13).

The Union counters that DCPS' assertion that the Award is contrary to law and public policy does not present a statutory basis for review because DCPS has failed to present any specific applicable law or public policy that mandates that the Arbitrator reach a different result. (See Opposition at p. 8). We agree.

The possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of Public Policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). We have also held that to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. See *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). In addition, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987); see also, *Washington -Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F. 2d 1234, 1239 (D.C. Cir. 1971).[5] Moreover, the petitioning party has the burden to specify applicable law and definite public policy that mandates that the Arbitrator reach a different result. *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000); See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). Furthermore, as the D.C. Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Local No. 246*, 554 A.2d 319, 325 (D.C. 1989).

In the present case, DCPS does not cite any specific law or public policy which mandates that the Arbitrator arrive at a different result. Instead, DCPS claims that there was no evidence that a

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[5] See, *Metropolitan Police Department and Fraternal Order of Police/Metroploitan Police Department Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (citing *American Federation of Government Employees, Loval 631 and Department of Public Works*, 45 DCR 6617, Slip Op. No. 365 at p. 4 n. 4, PERB Case No. 93-A-03 (1998); See, *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p.6, PERB Case No. 86-A-05 (1987).

thorough investigation was **not** conducted. Therefore, we believe that DCPS' argument merely represents a disagreement with the Arbitrator's findings of fact. This Board has held that "[i]t is well settled that disputes over the Arbitrator's evaluation of evidence does raise an issue for review." *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 46 D.C.R. 6284, Slip Op. No. 586 at p. 2, PERB Case No. 99-A-02 (1999). Thus, the Board finds that DCPS' claim does not present a statutory basis for review. As a result, we cannot reverse the Award on this ground.

In view of the above, we find that DCPS has not met the requirements for reversing Arbitrator Vaughn's Award. In addition, we find that the Arbitrator's conclusions are supported by the record, are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Public Schools, Division of Transportation's Arbitration Review Request is denied.

(2) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 22, 2006

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of	
Fraternal Order of Police/ District of Columbia Housing Authority Labor Committee,	
Complainant,	PERB Case No. 05-U-20
v.	Opinion No. 853
District of Columbia Housing Authority,	**FOR PUBLICATION**
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On January 7, 2005, the Fraternal Order of Police/District of Columbia Housing Authority Labor Committee ("Complainant", "Union" or "FOP") filed an unfair labor practice complaint ("Complaint") against the District of Columbia Housing Authority ("Respondent" or "DCHA"). The Complainant asserts th Sergeant at the Respondent and Sergeant Tyrone S. Poole violated D.C. Code § 1-617.04(a) by: (1) interfering with the Complainant in the exercise of its rights under the Comprehensive Merit Personnel Act ("CMPA"); and (2) taking reprisals against Special Police Officer Yvonne R. Smith ("SPO Smith"), FOP Chairperson, for her part in filing PERB Case No. 03-U-40. (See Complaint at p. 3) As a remedy, the Complainant requests that the Board order the Respondent to: (a) cease and desist from violating D.C. Code § 1-617.04; (b) discipline Sergeant Poole; (c) post a notice; (d) restore eight (8) hours of sick leave to Yvonne Smith; (e) review Yvonne Smith's last performance evaluation; and (f) pay the Complainant's costs, including attorney fees. (See Complaint at p. 3).

On January 27, 2005, the Respondent filed an Answer denying the allegations. In addition, the Respondent asserted that some of the acts alleged were untimely filed. On this basis the Respondent requested that the Complaint be dismissed. (See Answer at pgs. 5-6).

A hearing was held in this matter on October 28, 2005. In his Report and Recommendation (R&R), the Hearing Examiner concluded that the Respondent violated the CMPA. As a result, the Hearing Examiner is recommending that the Board order DCHA, among other things, to cease and desist from violating the CMPA and to post a notice. In addition, the Hearing Examiner recommends that "the Board should grant [any] other relief it deems appropriate." (R&R at p. 12).

DCHA did not file exceptions to the Hearing Examiner's R&R. However, the FOP filed Exceptions to the Hearing Examiner's recommended remedy. Specifically, FOP is requesting that the Board direct the Respondent to: (1) take corrective action against Sergeant Tyrone Poole; and (2) pay the Complainant's reasonable costs and attorney fees. (See Exceptions at p. 1).

The Hearing Examiner's R&R and the Complainant's exceptions are before the Board for disposition.

II. BACKGROUND

The Hearing Examiner noted that DCHA is an independent agency of the District of Columbia government and provides housing for low income residents. Pursuant to the United States Housing Act of 1937, 42 USC § 1401, *et seq*, the DCHA administers two programs: public housing; and the Housing Choice Voucher Program. Furthermore, the Hearing Examiner indicated that DCHA has its own Police Department. Relying on D.C. Code § 1-617.01, *et seq.*, the Hearing Examiner concluded that the DCHA and its Police Department are subject to the labor-management relations provisions of the CMPA. (See R&R at p. 2).

The FOP is the exclusive representative of DCHA employees in a bargaining unit consisting of special police officers, police officers and senior police officers. (See R&R at p. 2) During calendar year 2002, the parties negotiated an initial collective bargaining agreement. Special Police Officer (SPO) Yvonne Smith represented the FOP in the negotiations. When SPO Smith became FOP Chairperson, she filed an unfair labor practice complaint against her supervisor, Sergeant Tyrone Poole ("Sgt. Poole" or "Poole"). The complaint was assigned PERB Case No. 03-U-40.[1] In that case, FOP asserted that Sgt. Poole discouraged support of and membership in the FOP by falsely

[1] *FOP/DCHA Labor Committee v. District of Columbia Housing Authority*, PERB Case No. 03-U-40, involved the same parties in this matter.

accusing the FOP of failing to represent its members. (See R&R at p. 3). On August 4, 2003, the parties settled PERB Case No. 03-U-40. Pursuant to the terms of the settlement agreement, on September 23, 2003, Sgt. Poole was given a letter of counseling.[2] However, Sgt. Poole refused to sign the letter to acknowledge receipt. In addition, as part of the settlement, DCHA published a memorandum stating that DCHA, and not the FOP, had decided to eliminate roll call at headquarters. As a result of eliminating roll call at headquarters, supervisors were required to pick up daily activity reports from the officers at each post. Further, it eliminated the need for employees to drive their privately-owned vehicles to headquarters in order to deliver their activity reports after roll-call.[3] (See R&R at p. 4).

The FOP claims that Sgt. Poole subsequently has taken reprisal and has harassed SPO Smith as a result of the settlement agreement The FOP asserts that"[Sgt.] Poole lowered [SPO] Smith's annual evaluations because of her union activities [preventing her from receiving a performance bonus pursuant to the collective bargaining agreement.] [SPO] Smith had repeated conversations with [Sgt.] Poole concerning her performance evaluations and the time she was away from police duties on union business. . . . During the week of September 15, 2004, [Sgt.] Poole told [SPO] Smith she would never get an 'excellent' annual performance rating because of the time she devoted to union duties." (Tr. 56-57, R&R at p. 4). [Also,] [t]he FOP claims that "[Sgt.] Poole lowered [SPO] Smith's annual evaluations because of her union activities. [In addition,] [t]he FOP [contends that Sgt.] Poole lowered [SPO] Smith's rating to 'satisfactory' to prevent her from receiving a performance bonus pursuant to the parties' collective bargaining agreement (CBA). [Furthermore,] the FOP argues that Sgt. Poole denigrated [SPO] Smith's relationship with Deputy-Chief Millhouse, DCHA labor relations representative. He chastised [SPO] Smith for taking time off to perform union duties and referred to Millhouse as her 'Daddy' because he was the DCHA representative that she met with regularly regarding union matters." (See R&R at p. 4).

On January 7, 2005, the FOP filed this Complaint asserting as follows: "[after] the parties

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[2]The letter of counseling was dated July 2, 2003.

[3]Roll call was held daily at DCHA headquarters. It was the practice for police officers to turn in the previous day's activity reports from their posts after roll call at headquarters. They then drove to their posts at another location. The FOP attempted to negotiate compensation for police officers who drove their privately-owned vehicles from headquarters to their posts. During the negotiations, DCHA discontinued daily roll call at headquarters. As a result, after November 20, 2002, police officers reported directly to their posts. According to the FOP, this created more work for sergeants, including Sgt. Poole, because the sergeants had to drive to each post to pick up daily activity reports from the previous day. The FOP claims that this change was a direct result of the FOP's effort to negotiate compensation for police officers who drove privately-owned vehicles from headquarters to their posts after roll call. (See R&R at p. 4-5).

. . . settled [PERB] Case No. 03-U-40 . . . [Sgt.] Tyrone Poole has continued to make false accusations against [SPO] Yvonne Smith, has refused to undertake a fair and objective performance evaluation of [SPO] Smith, and has harassed and demeaned [SPO] Smith in front of co-workers, other supervisors and others. . . . [The FOP asserts that Sgt. Poole's actions] included, but [were] not limited to: [1] harassing [FOP's] chair[person,] on December 8, 2004 concerning her uniform [and] his own failure to pick up paperwork on a timely basis[,] using threatening gestures and language [when] making false allegations against her; [2] harassing [SPO Smith,] [FOP's] chair[person,] about her work status on October 16, [2004] and forcing her to remain on sick leave; [3] harassing and demeaning [SPO Smith] on September 17, 2004, in front of [] supervisors following an official meeting with [the] Respondent's officials; [4] falsely accusing [SPO Smith] of failing to perform her duties on or about September 1; and [5] informing [SPO Smith] that he would never give her an excellent performance evaluation." (Complaint at pgs. 2-3). The FOP maintains that the DCHA has engaged in conduct which constitutes an unfair labor practice by interfering with the rights guaranteed by the CMPA and by taking reprisals against FOP's Chairperson in violation of § 1-617.04(a) and requested the remedies set forth above. (See Complaint at pgs. 3-4).

In its Answer, the Respondent denies that it has violated D.C. Code § 1-617.04. Also, the Respondent maintains that the incidents noted by the FOP involve ordinary, day-to-day interactions between SPO Smith and Sgt. Poole and do not rise to the level of an unfair labor practice. In addition, the Respondent asserts that the FOP has failed to prove that there is a nexus between these incidents and the Union's claim of retaliation for filing an unfair labor practice charge in PERB Case No. 03-U-40 and the resulting settlement. (See Answer at p. 2). Specifically, the Respondent contends that during the alleged incidents, Sgt. Poole never mentioned: (1) the union; (2) Smith's position as the FOP chairperson; or (3) the previous unfair labor practice complaint in PERB Case No. 03-U-40 or the settlement. Furthermore, the Respondent asserts that "to the extent the events alleged occurred more than 120 days prior to the filing of this complaint they are time barred by [Board] rule 520.4". (See Answer at p. 6).

III. The Hearing Examiner's Report

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified two issues for resolution. These issues, his finding and recommendations, and FOP's exceptions, are as follows:

1. Whether FOP's Complaint was timely filed.

As a preliminary matter, the Hearing Examiner considered the Respondent's claim that the allegations concerning Sgt. Poole's evaluation of SPO Smith are outside the statutory limits for filing a complaint. The Hearing Examiner noted that Board Rule 520.4 provides that "[u]nfair labor

practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." Also, he indicated that the time limits for filing an unfair labor practice complaint are jurisdictional and mandatory. Citing *Hoggard v. Public Employee Relations Board*, 655 A.2d 320 (D.C. 1995); *Parker, Guess, Hubbard and Rope v. American Federation of Teachers and Washington Teachers' Union, Local 6*, Slip Opinion No. 764, PERB Case No. 03-U-30. Therefore, the time limit for filing a complaint cannot be waived. The Hearing Examiner determined that the portion of the Complaint pertaining to the evaluation of SPO Smith is outside the statutory limits for filing a complaint. Nevertheless, the Hearing Examiner found that these incidents may be considered as evidence of alleged violations occurring within the 120-day period. (See R&R at p. 6). The parties did not file exceptions to this ruling. However, the Board will review the record to determine if this ruling is reasonable, based on the record and consistent with Board precedent.

This Board has held that the deadline date for filing a complaint is "120 days after the date Petitioner admits he [or she] actually became aware of the event giving rise to [the] complaint allegations." *Hoggard v. DCPS and AFSCME, Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1993). See also, *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). Also, the Board has noted that "the time for filing a complaint with the Board concerning [] alleged violations [which may provide for] . . . statutory causes of action, commence when the basis of those violation occurred. . . . However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of a cause of action before the Board. The validation, i.e., proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 4414 at p. 3, PERB Case No. 95-S-01 (1995).

In the present case, FOP asserts that in June 2003 and June 2004, Sgt. Poole lowered SPO Smith's annual evaluations, preventing her from receiving a performance bonus pursuant to the collective bargaining agreement. (See Complaint at p. 4). Pursuant to Board Rule 520.4, the FOP was required to file a Complaint against the Respondent within 120 days of the June 2003 and June 2004 annual evaluations. However, the Complaint in this matter which contains allegations concerning the June 2003 and June 2004 annual evaluations was not filed until January 7, 2005. The January 7, 2005 filing occurred more than eighteen (18) months after the June 2003 evaluation and more than six (6) months after the June 2004 annual evaluation. In light of the above, FOP's allegations regarding the June 2003 and June 2004 annual evaluations clearly exceed the 120-day requirement in Board Rule 520.4.

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the

deadline for initiating an action. See, *Public Employee Relations Board*, 655 A.2d 320, 323 (DC 1995). Moreover, the Board has held that a Complainant's "ignorance of Board Rules governing [the Board's] jurisdiction over [unfair labor practice] complaints provides no exception to [the Board's] jurisdictional time limit for filing a complaint." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995). For the reasons noted above, the Board cannot extend the time for filing an unfair labor practice complaint. As a result, we adopt the Hearing Examiner's finding that the portion of the Complaint concerning the June 2003 and June 2004 annual evaluations is time-barred.

Having adopted the Hearing Examiner's finding that the allegations concerning the annual evaluations are time barred, we turn to the Hearing Examiner's finding that, nonetheless, these allegations may be considered as supporting evidence for alleged violations occurring within the 120-day filing period. (See R&R at p. 6). With respect to the allegations that are time-barred, we note that we have previously considered this issue and have held that "neither Board Rules nor the CMPA preclude the consideration of such allegations as evidence of [other] alleged violations occurring within 120 days of their filing." *Georgia Mae Green v. D.C. Department of Corrections*, 41 DCR 5991, Slip Op. No. 323 at n. 3, PERB Case No. 91-U-13 (1992), Supplemental Decision and Order (1993), citing *Lodge 1424, Machinists v. NLRB*, 362 U.S. 411 (1960) and *Mechanics Laundry & Supply, Inc.*, 240 NLRB 302 (1979). Consistent with our ruling in *Green v. Dept of Corrections*, we find that the Hearing Examiner's reliance on the evidence concerning the annual performance evaluations - as supporting evidence regarding other assertions of violations occurring within the 120-day jurisdictional period, is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings in this regard.[4]

2. Whether DCHA violated D.C. Code § 1-617.04(a).

Having resolved the issue of timeliness, the Hearing Examiner focused on the merits of FOP's allegations. The Hearing Examiner noted that employees of the District of Columbia have the right to form, join and assist a union or to refrain from such activity.[5] Further, he indicated that the District, its agents and representatives are prohibited from interfering, restraining or coercing any

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[4]As will be discussed below, the Hearing Examiner relied on this evidence when he found that four (4) incidents, which form the basis of the FOP's complaint, represent a pattern of harassment which is *supported by earlier conflicts between Smith and Poole*. (See R&R at. p. 11).

[5]D.C. Code § 1-617.01 (b) provides in pertinent part as follows: "Each employee of the District government has the right, freely and without fear of penalty or reprisal: (1) To form, join, and assist a labor organization or to refrain from this activity. . ."

employee in the exercise of the employee's rights guaranteed by the CMPA.[6] Also, he noted that the CMPA expressly protects the collective bargaining rights of all employees.[7] He further noted that the Board rules establish that the Complainant has the burden of proving unfair labor practice allegations by a preponderance of the evidence.[8]

The Hearing Examiner indicated that in order to prove that DCHA violated D.C. Code § 1-617.04(a) by taking reprisals against SPO Smith as a result of the settlement of PERB Case No. 03-U-40, the Complainant must show that: (1) SPO Smith engaged in protected union activities; (2) DCHA knew of the activities; (3) there was anti-union animus by DCHA; and (4) DCHA subsequently took reprisal against Smith. Citing, *Farmer Brothers Co.*, 303 NLRB 638 (1991); *D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital*, 46 DCR 6271, Slip Op. No. 583, PERB Case No .988-U-07 (1999). (See R&R at p. 7).

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[6]D.C. Code § 1-617.04, "Unfair labor practices", states at subsection (a) that the District, its agents, and representatives are prohibited from:

> (1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
>
> . . .
>
> (4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under this subchapter."

[7]See D.C. Code § 1-617.06. Employee rights.

> (a) All employees shall have the right:
>
> > (1) To organize a labor organization free from interference, restrain, or coercion;
> >
> > (2) To form, join, or assist any labor organization or to refrain from such activity; and
> >
> > (3) To bargain collectively through representatives of their own choosing a provided by this subchapter.

[8]Board Rule 520.11 provides, in part, as follows: "The party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence."

The Hearing Examiner noted that "[d]etermining a Respondent's motivation when the Complainant alleges discrimination based on union activity and anti-union animus is difficult. Therefore, a careful analysis must be conducted to ascertain if the stated reason is pretextual. As a result, the employment decision must be analyzed according to the 'totality of the circumstances'[.] [R]elevant factors include a history of anti-union animus, the timing of the action, and disparate treatment.[9] . . . [The Hearing Examiner noted that] the Respondent need only rebut the presumption created by the Complainant's *prima facie* showing and need not prove that a[n] [unfair labor practice] did not occur."[10] (R&R at pgs. 7-8).

At the hearing, the Respondent did not deny a September 15, 2004 interchange between Sgt. Poole and SPO Smith. However, the Respondent maintained that SPO Smith was disrespectful by refusing to telephone her post to locate her daily report for the previous day and therefore Poole wagged his forefinger at her as he spoke. Also, the Respondent asserted that Sgt. Poole denied a September 17, 2004 incident involving a 15-minute countdown for SPO Smith to return to her post. Alternatively, the Respondent argued that, even if the September 17 incident occurred as alleged, there is no nexus between the incident and SPO Smith's leadership of the FOP. (See R&R at pgs. 5-6) In addition, the Respondent claimed that an October 16, 2004 incident concerning SPO Smith's return from sick leave without a doctor's note, resulted when Sgt. Poole enforced a sick leave practice that had long been followed. However, because the parties' collective bargaining agreement had changed the practice, a doctor's note was no longer required. As a result, DCHA contended that it made the appropriate adjustments to Smith's sick leave balance and no grievance was filed. (See R&R at p. 6). Furthermore, the Respondent asserted that a December 8, 2004 incident where Sgt. Poole allegedly harassed SPO Smith over a wet neck tie, was nothing other than Sgt. Poole discussing the wearing of a complete uniform.

The Respondent maintained that Poole never mentioned SPO Smith's FOP leadership position. Therefore, the Respondent concluded that there was no nexus between this ordinary supervisor-employee interaction and interference with the union or its chairperson. The Respondent further argued that Sgt. Poole denied making the statement that he would never give SPO Smith an excellent evaluation. (See R&R at p. 6). Finally, at the hearing, DCHA Chief-of-Police Chief William L. Pittman testified regarding Sgt. Poole's refusal to sign the letter of counseling on September 23, 2003, that resulted from the settlement in PERB Case No. 03-U 40. Chief Pittman

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[9]See *Doctors Council of the District of Columbia and Dr. Henry Skopek v. District of Colulmbia Commission on Mental Health Services*, Slip Op. No. 636, PERB Case No. 99-U-06 (2000).

[10]See *Georgia Mae Green v. District of Columbia Department of Corrections*, 41 DCR 5991, PERB Slip Op. No. 323, Case No. 91-U-13 (1992), Supplemental Order (1993).

testified that he could not explain why Sgt. Poole, a "good supervisor" who would be aware that signing the letter of counseling "noted only its receipt", did not sign it. (Tr. 139-140).

The Respondent denied violating the CMPA and requested as a remedy that the Board order FOP to pay reasonable costs. (See Answer at p. 6).

The Hearing Examiner determined that the outcome of this case rests on the credibility of the witnesses. (See R&R at p. 9). Based on the demeanor of the witnesses and other relevant factors, the Hearing Examiner concluded that "[SPO] Smith [was] a credible witness and her testimony establishe[d] that [Sgt.] Poole acted unprofessionally in the incidents forming the basis of the FOP's [unfair labor practice] complaint. [The Hearing Examiner determined that Sgt.] Poole's pattern of behavior toward SPO Smith demonstrated a lack of respect for Smith not only as an employee, but also as the FOP Chair[person].

[The Hearing Examiner also concluded that SPO] Smith's testimony establishe[d] that [Sgt.] Poole was abusive and hostile toward her in the security booth on September 15, 2004. [The Hearing Examiner] [was] convinced that [on September 17, 2004, Sgt. Poole] conducted a 15 minute countdown for [SPO] Smith to return to her post from DCHA headquarters. . . . [Regarding] the October 16, 2004 incident involving [Sgt.] Poole's [alleged] inappropriate demand for a doctor's note from Smith, [the Hearing Examiner noted that] DCHA and [Sgt.] Poole admitted [that] he was wrong to have done so. [The Hearing Examiner also indicated that Sgt.] Poole's testimony and [his] explanation [that he was confused] over the DCHA policy regarding doctor's notes was evasive at times. Further, [Sgt. Poole's testimony] demonstrated that he was ignorant of the requirements of the parties' collective bargaining agreement despite the fact that the agreement had been in place for two years. [In addition, the Hearing Examiner found that SPO] Smith testified credibly regarding the December 8, 2004 incident [regarding Sgt.] Poole's insistence that she wear a wet uniform neck tie. Finally, [the Hearing Examiner noted that [Sgt.] Poole d[id] not deny shaking his finger at Smith." (R&R pgs. 9-10) Having made these findings, the Hearing Examiner found that these four (4) incidents which form the basis of FOP's complaint, represent a pattern of harassment which is supported by earlier conflicts between Smith and Poole. (See R&R p. 11).

Next, the Hearing Examiner addressed whether Sgt. Poole was motivated by anti-union animus and took reprisals against SPO Smith: (1) for her union activity, or, (2) as a result of the letter of counseling (issued to him pursuant to the settlement of PERB Case No. 03-U-40) which he refused to sign on September 23, 2003. (See R&R at p. 9) The Hearing Examiner determined that Sgt. Poole's motivation is revealed by his reaction to the letter of counseling. The Hearing Examiner reasoned that the settlement of PERB Case No. 03-U-40 and Sgt. Poole's refusal to sign the ensuing counseling letter is not evidence of DCHA's violation of D.C. Code § 1-617.04(a) in the instant case. However, Sgt. Poole's refusal to sign the counseling letter supports an inference as to his state of

mind.[11] The inference is that he did not accept DCHA's conclusion that he had violated the parties' collective bargaining agreement and that he would seek reprisals against SPO Smith in her capacity as FOP chairperson. The Hearing Examiner found that this inference is supported by Chief Pitman's testimony. Specifically, the Chief testified that he could not explain why Poole, a "good supervisor" who would have knowledge that signing a letter of counseling acknowledged only its receipt, did not sign the letter of counseling. (See Tr. 139-140). Furthermore, the Hearing Examiner noted that Poole never explained why he refused to sign the letter of counseling. (See R&R at pgs. 10-11).

In particular, the Hearing Examiner found that the record established the existence of a suspiciously altered June 2003 annual performance evaluation for SPO Smith from Sgt. Poole. Sergeant Poole could not satisfactorily explain the alteration of the document which resulted in Smith's evaluation being lowered from "excellent" to "satisfactory". The Hearing Examiner determined that although these earlier incidents are outside the Board's 120 day jurisdictional period, "the annual performance evaluations may be considered as evidence supporting the FOP's assertions of violations occurring within the 120-day jurisdictional period." (R&R at p. 9). As a result, he concluded that Sgt. Poole's harassing conduct toward Smith was motivated by anti-union animus and constituted reprisal for the settlement agreement in PERB Case No. 03-U-40 in violation of D.C. Code § 1-617.04. (See R&R at pgs. 11-12).

No exceptions were filed regarding the Hearing Examiner's conclusion that the DCHA violated the CMPA. Nonetheless, pursuant to D.C. Code § 1-610.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner. See *Teamsters Local Union No. 730 a/w International Brotherhood of Teamsters, Chauffeurs,*

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[11]The July 2, 2003 Documentation of Counseling states, in pertinent part:

> In March 2003, Special Police Officer Catina Schanck complained to you regarding being held over because her radio had to be picked up from the post. You inferred that it was the FOP Union's fault that she was being held over. You admitted to making such a statement. Your comment and action during this conversation are in violation of the provisions of the Master Agreement between the FOP and DCHA. You are ordered not to make anymore statements that are, or could be perceived to be in violation of the agreement between the FOP and DCHA.
>
> The facts set forth above indicate that you are not meeting the required standards of your position in this instance. Failure on your part to bring this aspect of your performance up to a satisfactory level shall result [in] disciplinary action being taken against you.

Warehousemen and Helpers of America, AFL-CIO/CLC v. District of Columbia Public Schools, 43 DCR 5585, Slip Op. No. 375, PERB Case No. 93-U-11 (1994). We find that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings and conclusion that the Respondent has engaged in the conduct alleged and thus violated D.C. Code §1-617.04(a).[12]

IV. Remedy

Since we have adopted the Hearing Examiner's findings that DCHA violated the CMPA, we now turn to the issue of what is the appropriate remedy in this case.

As a remedy, both parties requested that the Board order the other party to pay reasonable costs. Also, the FOP requested that the Board order the Respondent to: (1) restore eight (8) hours of sick to SPO Smith; (2) cease and desist from violating the CMPA; (3) order the Respondent to discipline Sgt. Poole; (4) review Yvonne Smith's last performance evaluation; (5) post a notice; and (6) pay attorney fees. (See Complaint at p. 5).

The Hearing Examiner has recommended that DCHA be ordered to: (1) restore eight (8) hours of sick leave to SPO Smith; (2) cease and desist from violating employees' rights under the CMPA; and (3) post a notice to all employees. However, the Hearing Examiner denied FOP's request for reasonable costs and attorney fees. (See R&R at p. 12). In addition, he denied the request to order DCHA to discipline Sgt. Poole.

As stated above, we have adopted the Hearing Examiner's findings and conclusions that the Respondent violated the CMPA by violating the rights of SPO Smith's rights under D.C. Code § 1-617.04(a)(1) and (4). Therefore, we find that restoring eight (8) hours of sick leave to SPO Smith's leave balance will make her whole. We find this remedy to be reasonable, supported by the evidence and consistent with Board precedent. Also, we adopt the Hearing Examiner's recommendation that DCHA cease and desist from violating the CMPA.[13]

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[12]Specifically, based on the allegations contained in the Complaint, the arguments of the parties and the Hearing Examiner's R&R, we find that the Respondent violated D.C. Code § 1-617.04(a)(1) and (4).

[13]Furthermore, as stated previously, the unfair labor practice allegations pertaining to the June 2003 and June 2004 performance evaluations was not timely filed and cannot be considered here, except as supporting evidence for alleged violations within the 120-day filing period. Therefore, no remedy may be granted concerning the allegation pertaining to performance evaluations.

"With regard to the remedy of posting a notice to employees, we recognize that when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of the relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations." *National Association of Government Employees, Local R3-06 v. D.C. WASA*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). As a result, we adopt the Hearing Examiner's recommended remedy and direct DCHA to post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of DCHA's conduct and are affected by it, would know that DCHA has been directed to comply with the CMPA. "Also, a notice posting requirement, serves as a strong warning against future violations." *Wendell Cunningham v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 49 DCR 7773, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 & 01-S-01 (2002). In light of the above, we believe that the Hearing Examiner's suggested remedy of posting a notice is appropriate.

With respect to FOP's request for attorney fees, the Hearing Examiner noted that the Board lacks the authority to award attorney fees. Citing *AFSCME District Council 20, Locals 1959 and 2921 v. D.C. Public Schools and D.C. Government*, Slip Op. No. 796 at p.5, PERB Case No. 05-U-06 (2005). Therefore, he denied the request for attorney fees. Also, the Hearing Examiner observed that the Board will assess reasonable costs if required in the interest of justice based on an evaluation of the facts in each case. Citing *Milton v. D.C. Water and Sewer Authority*, 47 DCR 1443, Slip Op. No. 622 at p. 5, PERB Case No. 98-U-24 and 98-U-28 (2000). Further, the Hearing Examiner noted that the Board has long held that absent evidence of bad faith in filing a unfair labor practice complaint, it will not impose the sanction of costs.[14] The Hearing Examiner found no evidence that the Respondent acted in bad faith. Therefore, he concluded that the awarding of costs would not be in the interest of justice and denied the Complainant's request for costs. (See R&R at p. 12).

The Complainant filed exceptions stating that the Hearing Examiner should have recommended that Sgt. Poole be disciplined because he has previously violated employees' rights under the CMPA. Also, FOP asserts that attorney fees and costs should be granted in the interest of justice. The Respondent did not file exceptions.

We note that in his R&R, the Hearing Examiner did not address the Complainant's request that Sgt. Poole be disciplined. We believe that the failure of the Hearing Examiner to address this issue may have been an oversight on his part. Therefore, we will address the issue. The Complainant argues that the Board should order DCHA to discipline Sgt. Poole because he has previously violated

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[14]See *Forbes v. Teamsters Local 1714*, 36 DCR 7107, Slip Op. No. 229 at p. 4, PERB Case No. 88-U-20 (1989).

the CMPA. However, the Complainant has failed to provide any legal authority in support of this proposition. Moreover, the allegations concerning Sgt. Poole's conduct in PERB Case No. 03-U-40, were settled by the parties. Therefore, this Board has made no prior determinations concerning Sgt. Poole's conduct. Thus, we believe that FOP is requesting that we adopt FOP's remedy without providing sufficient evidence or legal support. As a result, we conclude that this exception lacks merit.

Next, the Complainant takes exception to the Hearing Examiner's denial of its request for attorney fees. "The Board has held that D.C. Code § 1-61[7].13 which expressly permits the Board to require the payment of reasonable costs incurred by a party, does not include attorney fees. Nor are we properly authorized to provide attorney fees elsewhere in the Code." *Tracy Hutton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 8, PERB Case No. 95-U-02 (1995). See also, *International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op No. 322, PERB Case No. 91-U-14 (1992); and, *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). In light of the above, we adopt the Hearing Examiner's determination that attorney fees be denied.

Finally, the Complainant takes exception to the Hearing Examiner's denial of reasonable costs. Therefore, pursuant to D.C. Code §1-617.13(d), we will consider whether the Complainant should be awarded reasonable costs in this case. The Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245 at pgs. 5-6, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs. In that case, we noted as follows:

> First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.
>
> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing

> party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

We note that in the present case, the Hearing Examiner found that the allegations concerning the June 2003 and June 2004 annual evaluations were time-barred. As a result, it cannot be said that the Respondent's claim or position concerning these allegations was "wholly without merit". Furthermore, the Hearing Examiner determined that the Respondent did not act in bad faith. In light of the above, we find that an award of costs is not in the interest of justice. As a result, we adopt the Hearing Examiner's recommendation that the request for costs should be denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Housing Authority ("DCHA") its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) by interfering, restraining, or coercing employees in the exercise of the rights guaranteed by D.C. Code § 1-617.04(a)(1).

2. DCHA its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(4) by taking reprisals against Yvonne Smith because she has signed or filed an affidavit, petition, or complaint or given any information or testimony under D.C. Code § 1-617.04(a)(4).

3. DCHA its agents and representatives shall immediately restore eight (8) hours of sick leave to Yvonne Smith's leave balance.[15]

4. DCHA shall post conspicuously within ten (10) days from the service of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

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[15]DCHA asserted that this has already been done. However, DCHA has not provided any evidence to support this claim. Thus, if DCHA has restored the eight (8) hours of leave, they should submit proof. If this has not been done, then DCHA is directed to do so.

5. DCHA shall notify the Public Employee Relations Board ("Board"), in writing within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. In addition, DCHA shall notify the Board of the steps it has taken to comply with the directives in paragraphs 3 and 4 of this Order.

6. Pursuant to Board Rule 559.1, and for purposes of D.C. Code § 1-617.13(c), this Decision and Order is effective and final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D. C.

September 28, 2006